150 US 572

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JAMES H. McKE
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In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1891. (No. 625.)

JESSE P. FARLEY,
Appellant,

against

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, as Executor, &c., et al.,
Appellees.

LAW ASSOCIATION OF PHILADELPHIA

Answer of James J. Hill and The St. Paul, Minneapolis & Manitoba Railway Company to Petition for Substitution.

M. D. GROVER,
GEO. B. YOUNG,
Solicitors and Counsel for Appellees.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891. (No. 625.)

JESSE P. FARLEY,
Appellant,

vs.

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, (as Executor of the Last Will and Testament of Norman W. Kittson, Deceased,) and THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,
Appellees.

Answer of James J. Hill and the St. Paul, Minneapolis & Manitoba Railway Company, (hereinafter for brevity styled the Manitoba Co.,) defendants and appellees, to the petition of the devisees and legatees of Norman W. Kittson, deceased, to be substituted as defendants in place of the executor, etc.

These defendants, for answer to said petition, say:

1. That it appears by the transcript of the record in this cause, which is filed in this court, and the facts are, that this is a suit in equity, brought in the Circuit Court for Minnesota against Norman W. Kittson, (now deceased,) and these defendants James J. Hill and the Manitoba Co. That all the defendants answered the bill; and a replication was duly filed. That on the 10th day of May, 1888,

after the plaintiff had taken his evidence in chief, and while the defendants were in course of taking their evidence, the defendant Norman W. Kittson, died, testate; that his will was duly proved in the county of his domicile and residence, to-wit, in the Probate Court of the County of Ramsey and State of Minnesota, and letters testamentary duly issued from said court to the St. Paul Trust Company, the executor named in said will, which had duly qualified as such and had accepted said trust, and which has ever since been and now is such executor. That thereafter and upon proceedings duly had in said Circuit Court, the cause was revived against the said executor, and the appearance of said executor was duly entered as a defendant in place of said testator, and the cause proceeded against said executor and the surviving defendants, and further evidence was taken by the defendants and by the plaintiff, and in December, 1888, the cause came on for final hearing by said Circuit Court, upon the pleadings and proofs, and was duly heard and taken under advisement; and thereafter, and on the 13th day of September, 1889, the said court did render its decision and make its order that the bill be dismissed. That pursuant to such decision and order a decree dismissing said bill was duly entered in said Circuit Court on the 27th day of September, 1889. That the plaintiff duly appealed from said decree, and did cause the transcript of the record to be filed, and the appeal to be docketed, in this court at the October term, 1889.

2. And these defendants say that it appears by the pleadings in this cause, which are included in the

transcript of record filed in this court, and a correct printed copy whereof is hereto attached as part of this answer, that this suit was brought upon the agreement alleged in the bill of complaint, for a discovery, accounting, and division of profits of the business of a partnership, or association in the nature of a partnership, alleged to have been formed by the plaintiff and the defendants Kittson and Hill and George "Stevens" and Donald A. Smith, in the bill named, for the purchase of railway mortgage bonds, the sale of such bonds to a new railway company to be formed by the partners or associates or some of them, the purchase of the mortgaged property by such new railway company, using therefor the mortgage bonds in payment or part payment, and a division among the partners or associates of the profits of the enterprise. The bill alleges that all these things (except the division) were done, all the cost of the bonds and all expenses of the enterprise paid, and that the profits realized consisted of the capital stock of the Manitoba Co., to-wit, $15,000,000, divided into shares of $100 each, which are alleged to be worth par, and of other property, to the amount of many hundred thousands of dollars. The bill alleges that, as plaintiff believes, (though he is unable to state definitely,) one-half of the profits were to go to Smith and "Stevens," and that the residue of the profits were to belong equally to the plaintiff and the defendants Hill and Kittson; and that a portion of the profits to which these last three are entitled, to-wit, 57,646 shares of the Manitoba Co., of the par value and actual value of $5,764,600, have been issued to defendants Kittson and Hill, one-half, or

28,823 shares, to each; and that other profits, amounting to many hundred thousands of dollars, have been divided among Smith, "Stevens," Kittson and Hill, and that plaintiff is entitled (among other things) to one-third of all the profits received by the defendants Kittson and Hill.

3. That it does not appear from the bill of complaint or otherwise, nor is there any evidence in the case to prove, that any of the property specified in the testator's will (a copy whereof, which these defendants admit to be correct, is attached to said petition) formed any part of the profits of the business or enterprise of the alleged partnership or association.

4. Further answering said petition, these defendants say that they are informed and believe, and state the fact to be, that the estate of said testator is of the value of $2,734,818.64, and no greater sum, and they say that the claim of said plaintiff, as stated in said bill, amounted, at the date of filing said bill (to-wit, on December 15, 1881,) to upwards of $2,500,000.

And these defendants say that by reason of the matters in this answer stated, and the matters set forth in said petition, this court ought not to grant or to entertain the petition, or the motion based thereon, of the said petitioners.

M. D. GROVER,
GEO. B. YOUNG,
Solicitors and Counsel for James J. Hill and the St. Paul, Minneapolis & Manitoba Railway Company, Defendants and Appellees.

STATE OF MINNESOTA, }
COUNTY OF RAMSEY. } ss.

George B. Young, being duly sworn, makes oath and says that he is, and has been from the commencement of the above entitled cause, one of the solicitors and counsel therein for the defendants and appellees, James J. Hill and The St. Paul, Minneapolis & Manitoba Railway Company, both in the Circuit Court and in this court, and that the foregoing answer is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters it is true to the best of his knowledge, information and belief. Affiant further says that the reason why this affidavit of verification is made by affiant is that the said James J. Hill is absent from the State of Minnesota where resides this affiant; that said James J. Hill is president of said railway company, and that this affiant, as solicitor and counsel as aforesaid, is better informed as to the matters stated in said answer than any officer of said company.

GEO. B. YOUNG.

Subscribed and sworn to this 22d day of February, A. D. 1892, before me.

GEORGE BEALZ,

(Notarial Seal.) Notary Public,
Ramsey County, Minn.

IN THE UNITED STATES CIRCUIT COURT,

DISTRICT OF MINNESOTA

IN EQUITY.

AMENDED BILL OF COMPLAINT.

[*Filed, Dec. 15, 1881.*]

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA.

IN EQUITY.

JESSE P. FARLEY

vs.

NORMAN W. KITTSON, J. J. HILL, AND THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

To the Honorable Judges of said Court:

Your orator, Jesse P. Farley, of Dubuque, Iowa, and who is a citizen of the state of Iowa, brings this his bill against Norman W. Kittson and James J. Hill, of St. Paul, Minnesota, and who are citizens of the state of Minnesota, and the

St. Paul, Minneapolis & Manitoba Railway Company, a corporation created, organized, and existing under the laws of the state of Minnesota, and a citizen of said state, and thereupon your orator complains and says:

I.

That in the summer of 1876, he and the said defendants Norman W. Kittson and James J. Hill, mutually agreed by and between themselves, each with the other, that they would jointly undertake, for their joint, mutual, and equal interest, benefit, advantage, and profit, to acquire by purchase or contract, all the bonds possible to be obtained of the First Division of the St. Paul & Pacific Railroad Company, and of the St. Paul & Pacific Railroad Company, corporations created and existing under the laws of the state of Minnesota, and owning lines of railroad and other property in said state, which bonds had theretofore been issued by said respective companies, and were outstanding, and for sale by the holders thereof at a large discount, and were secured by mortgages upon the lines of road and other property of said companies, and which mortgages were then in process of foreclosure in five several suits in courts in said state, for default in the payment of the interest upon said bonds. That the understanding, object, purpose and agreement of said parties in acquiring said bonds, was to become the purchasers of said lines of railroad, and other mortgaged property, when offered for sale under decrees for the foreclosure of said mortgages, and to turn in and use said bonds in payment or part payment therefor, and thereby through and by means of said bonds, acquire said lines of railroad and other property. That the said defendant Kittson represented that he could procure from one Donald A. Smith, and other capitalists in Canada, the necessary funds that would be required in said undertaking. And it was further agreed

by and between your orator and said Kittson and Hill, that if it should become necessary to do so, the said Kittson might use, or give to said Smith and others furnishing the required funds, an interest with them in said purchases and enterprise, but that the interest not so used or given should be retained and held for the mutual, joint, and equal benefit of your orator, and said Kittson and Hill.

It was also then and there further agreed, by and between your orator and said Kittson and Hill, that the details of the negotiations for procuring the necessary funds, and for the purchase of said bonds, should be principally conducted and managed by the said Kittson and Hill, and such person or persons as an interest in said enterprise should be given to for furnishing funds therefor, and that your orator should furnish such facts, information, and advice, and render such aid and assistance therein from time to time, as should be required of him. That your orator had knowledge not possessed by any of the other parties, as to the whereabouts and situation of said bonds, the rated value thereof by the holders, the mode whereby, and the channel through which the same could be reached and procured; also in respect to the situation, amount, character, and value of the lines of railroad and property mortgaged to secure said bonds, and in respect to the pending suits for the foreclosure of said mortgages; and that the services of your orator in respect to all of said matters, and his co-operation, were indispensable to the success of said enterprise.

II.

And your orator further alleges that thereupon the said defendant Kittson made arrangements with and procured the said Donald A. Smith, in conjunction with one George Stevens, to join in said enterprise and furnish funds to purchase or secure the control and use of said bonds as far as

found practicable, and to carry out said undertaking; and in consideration thereof agreed to give the said Smith and Stevens a certain fractional interest in said enterprise, but of the precise terms of the agreement with them as to the interest they were to have in said enterprise, your orator is not definitely advised, but on information and belief alleges the same to have been one-half; the balance, however, not so agreed to be given to the said Smith and Stevens, belonged to your orator, and the said Kittson and Hill, in equal proportions, under the said agreement between them.

III.

And your orator further alleges that thereupon, and in 1877, active negotiations were opened and carried on by the said Smith, Stevens, Kittson, Hill, and your orator, for the purchase of said bonds, in pursuance of the aforesaid understandings and agreements appertaining to said enterprise, and were continued down into the month of June, 1879, and as a result thereof, they purchased and secured a large quantity of said bonds, amounting, in the aggregate, at their face value and overdue interest, to over twenty-five million dollars.

That said purchases were made by and in the name of said Smith, Stevens, Kittson, and Hill, but for the purpose and with a view to their use in the purchase of said lines of railroad and other mortgaged property when offered for sale under foreclosure decrees, and under and in pursuance of the agreements and understandings between your orator and the said Kittson and Hill, hereinbefore stated in respect thereto.

That throughout said negotiations for the purchase of said bonds, and in the purchases thereof, your orator was continuously called upon by the said Kittson and Hill for facts and information, advice and co-operation, in respect thereto, and at their request furnished and rendered the same, pur-

suant to the aforesaid agreements and understandings between them; and that said negotiations were only successful through and by means of the advice and co-operation of your orator, and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill, at their request, under said understandings and agreements between them as aforesaid.

That most of said purchases of said bonds were made under an agreement with the holders thereof, whereby payment therefor was not to be made until decrees of foreclosure of the mortgages given to secure the same should be rendered, and the lines of railroad and other property sold under such decrees, and acquired by said purchasers, and a new issue of bonds made, secured by a new mortgage on the same property; whereupon it was optional with the seller of the bonds to demand cash at the agreed purchase price, or take the new bonds of the newly to be organized company.

That it was the understanding on the part of all said parties, that as soon as said lines of railroad and other mortgaged property should be acquired by them under said decretal sales, a new issue of bonds should be made by them, or by the company to be organized by them, to take, hold, manage, and operate said property, and secured by a new mortgage upon said property, of sufficient amount to cover and defray the cost of said bonds and all expenses connected with the carrying out of said enterprise.

Your orator further alleges that nearly all of said bonds (the exact amount is unknown to your orator) were held and owned by residents in Holland, Europe, and that one John S. Kennedy, of New York city, was the duly appointed, constituted, and acting agent and attorney in the United States of a large majority (the exact amount is unknown to your orator) in amount of each class and issue of said bonds, and of the holders and owners thereof, with full power and authority to take such action in respect thereto as in his judg-

ment might seem best; and that he was also a trustee in all the said mortgages, excepting the one for fifteen million dollars on the extension line, and that he was the agent for and held and represented over eleven million dollars of the bonds issued under and secured by said fifteen-million mortgage; he was plaintiff in all said foreclosure suits, except in the one to foreclose said fifteen-million mortgage, and that all said suits were caused to be commenced by him, as such agent, and were prosecuted under and subject to his general control and direction as such agent and trustee; and that your orator was appointed receiver of the property of the St. Paul & Pacific Railroad Company, and was made general manager of the lines of road of the First Division of the St. Paul & Pacific Railroad Company, under the trustees in said mortgages in possession thereof, upon the recommendation and at the instance and request of said Kennedy.

And your orator states that after said agreement between him and said Kittson and Hill, and before the decrees of foreclosure in said suits, and before the said purchase of said bonds, or any of them, and while negotiations were pending for the purchase of the bonds represented by the said Kennedy as aforesaid, he, the plaintiff, informed the said Kennedy of his said interest and connection with the said Kittson and Hill in the project for the purchase of said bonds, and that the said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully approved and sanctioned the same. And that the negotiations which resulted in the purchase of said bonds, as aforesaid, were mainly had with and conducted by the said Kennedy, on behalf of said bondholders, as their agent in the premises. And said bonds, when so purchased, were placed in the hands of said Kennedy and his copartner, John S. Barnes, as trustees, to be held by them until paid for pursuant to the contract of purchase, and were so held,

and only delivered upon payment therefor pursuant to the agreement of purchase. And the said Kennedy, as agent as aforesaid, strongly recommended the bondholders to sell their bonds upon the terms offered by the said Stephens, Smith, Kittson, and Hill, as the best disposition of them that could be made; and that but very few of said bonds were purchased by said Stephens, Smith, Kittson, and Hill, except under and through the said negotiations with the said Kennedy therefor.

And your orator says that to all inquiries made by the said Kennedy, or any of the trustees in said mortgages, or by any of the holders of any of the bonds secured thereby, or by any one interested in the property under his charge as manager and receiver, he at all times gave full and true answers and information to the best and utmost of his knowledge and ability, and kept the said Kennedy fully informed of all facts, matters, and things coming to his knowledge affecting said property, and in all things acted honestly and in good faith towards all persons interested in the property under his control as receiver and manager, as aforesaid.

And your orator states that the suit in which he was so appointed receiver of the property of the St. Paul & Pacific Railroad Company was not a suit for the foreclosure of any mortgage, but was a suit commenced in this court by the said Kennedy and his copartners, on behalf of themselves and other bondholders, simply to have a receiver appointed of said property with a view to its preservation, and the completion of certain unfinished sections of the lines of road of said company.

IV.

And your orator further alleges that the said defendant, the St. Paul, Minneapolis & Manitoba Railway Company, is a corporation, organized in May, 1879, under the laws of the state of Minnesota, by the said Smith, Stevens, Kittson, and

Hill, for the purpose of acquiring, taking, holding, operating, and managing said lines of railroad, and other mortgaged property, for the use and benefit of the said parties interested in the purchase of said bonds as aforesaid, when said lines of railroad and other mortgaged property should be acquired by or for them, or offered for sale under said foreclosure decrees; and that the said Smith, Stevens, Kittson, and Hill are directors and officers of said company, and have the control and management of the same.

V.

Your orator further alleges that in the months of March and April, 1879, foreclosure decrees were duly had, taken, and entered in said pending suits for the foreclosure of said mortgages given to secure said bonds, directing the sale at public auction of the said lines of railroad and other property of the said mortgagor railroad companies, covered by said mortgages; which decrees severally provided, among other things, that in payment for the mortgaged property so ordered to be sold, the said mortgage bonds and overdue coupons should be taken as cash for such an amount as would equal the dividend to which they would be finally entitled *pro rata* under the decrees; and that in the months of May and June, 1879, sales were duly had and made of said lines of railroad and other mortgaged property, under and pursuant to said foreclosure decrees, and the same were all bid in, purchased, or acquired by the said St. Paul, Minneapolis & Manitoba Railway Company, for the use and benefit of the aforesaid parties in interest in the purchase of said bonds, as aforesaid, including your orator, by the direction and procurement of the said Kittson, Hill, Smith, and Stevens; and that all of said bonds, which had been purchased as aforesaid, were turned in and used in payment of said lines of railroad and property, by the said Kittson, Hill, Smith, and

Stevens; and that the said railway company paid nothing in the purchase of said railroads and property, but took the same without consideration, except the consideration furnished and provided by your orator, and said Kittson, Hill, Smith, and Stevens, and which consideration so furnished and provided, aside from said bonds as aforesaid, was furnished by the said Smith and Stevens, pursuant to the aforesaid arrangement with them for joining in said enterprise.

That over five hundred miles of railroad in said state of Minnesota, with the equipments appertaining thereto, and over one million acres of land in said state, and much other valuable property, and in all worth over fifteen million dollars, were thereby acquired and became vested in said defendant railway company, for the use and benefit of your orator, and the said Kittson, Hill, Smith, and Stevens in proportion to their several and respective interests in said bonds so purchased as aforesaid, subject only to the advances made, and obligations incurred in connection with said enterprise.

At the time of the said purchase of said lines of railroad and other mortgaged property, and at the time of the use of said bonds, as aforesaid, in payment therefor, and at the time said property was vested in said defendant railway company, the said Smith and Stevens, and the said railway company, had notice and knowledge that your orator was jointly and equally interested in said bonds so purchased as aforesaid, and in said undertaking and enterprise with the said Kittson and Hill.

VI.

Your orator further states that on the 21st of June, 1879, the said defendant railway company, by the direction of the said Stevens, Smith, Kittson, and Hill, issued and negotiated its bonds to the amount of eight million dollars, payable in 1909, with interest payable half yearly, at 7 per cent. per

annum, and at the same date executed a mortgage or trust deed to secure said bonds on said lines of railroad, lands, and all other property of said company; and that said bonds, and the proceeds thereof, were used, so far as was necessary, to pay the costs of said bonds so purchased as aforesaid, and all other expenses incurred or incident to said enterprise, and that said eight million dollars of bonds, and the proceeds thereof, were more than sufficient for said purposes.

VII.

That since June 15, 1879, said defendant railway company, under the control and management of said Smith, Stevens, Kittson, and Hill, has been in the possession of said lines of railroad, lands, and other property, and has operated said railroads, and has received from the earnings thereof over five hundred thousand dollars, over and above operating expenses and interest on said eight million dollar mortgage; and has also sold large quantities of lands and other property acquired as aforesaid, and realized therefrom large sums of money, but the amount thereof your orator is unable to state, and has also made expenditures in connection with said property, but the amount thereof is unknown to your orator.

VIII.

The capital stock of said defendant railway company is fifteen million dollars, divided into shares of one hundred dollars each, which stock now represents the said property so acquired by the said railway company, and constitutes, in part, the profits arising and resulting from said enterprise; but that, aside from said stock, other profits, amounting to many hundred thousand dollars, have been realized from said enterprise, through the agency of said railway company and otherwise, and have been divided between said

Smith, Stevens, Kittson, and Hill; that a large amount of the said capital stock of said railway company has been issued by said company and divided between said Smith, Stevens, Kittson, and Hill; and that the said railway company has delivered to the said Kittson and Hill fifty-seven thousand six hundred and forty-six shares thereof—to the said Kittson one-half thereof in his own individual name and right, and to the said Hill one-half thereof in his own individual name and right—being a portion and part thereof, to which your orator and the said Kittson and Hill are entitled, under and pursuant to the said arrangement made with said Smith and Stevens in connection with said enterprise; and that said railway company has neglected and refused, and still neglects and refuses, to deliver to your orator any part of said stock so issued, and that said stock is worth par value.

IX.

Your orator further shows that the said defendants Kittson and Hill never denied, disputed, or questioned, but always admitted and recognized, the right of your orator, under the said agreement and understanding between them, to an equal share and interest in said enterprise, and in the results and avails thereof, with them, the said Kittson and Hill, until after the organization of the said defendant railway company in May, 1879, and then, at first, only intimated or suggested to your orator that his share or interest ought not to be equal to theirs, as they had, they claimed, been required to advance some money in carrying out said enterprise. But now so it is, may please it your honors, that the said Norman W. Kittson and James J. Hill, colluding and confederating with each other, and with the said defendant railway company, to wrong and defraud your orator, give out and pretend that he has no rights or interest in said enterprise, or in the benefits, results, avails, or profits thereof; and refuse to de-

liver or turn over to him any of the said capital stock in said railway company, so received by them, or account to him therefor; and refuse to pay over or account to him for any of the results, avails, or profits of said enterprise received or realized by them, and refuse to render him any statement or account appertaining to said enterprise; and have thus far, and claim that they will in the future, wholly appropriated to their own use, to the entire exclusion of your orator, all the results, avails, and profits of said enterprise and undertaking, to which the said Smith and Stevens are not entitled under the aforesaid agreement made with them; and the said defendant railway company, conspiring with the said Kittson and Hill to cheat and defraud your orator, refuses to account to him for his interest in the said property and effects, and every part thereof, which have come to its possession and been appropriated by it as aforesaid; and has refused, and still refuses, to issue to him his proportion, or any, of its capital stock; and has wrongfully and fraudulently issued the same, in part, to the said Kittson and Hill, and refuses to account to your orator for any of the profits accruing from said lines of railroad, land, and other property, but persists in ignoring and disregarding the rights of your orator in the premises.

All which actings, doings, and pretenses are contrary to equity and good conscience, and tend to manifest wrong and injury of your orator in the premises.

In consideration whereof, and for as much as your orator can only have adequate relief in the premises in this honorable court, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed for, and may, to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect, answer make to all

and singular the matters aforesaid, (but the oath of said defendants thereto, and of each of them, is hereby waived,) as fully and particularly as if the same were here repeated, and they and each of them distinctly interrogated in respect thereto; and more especially that the said defendants Kittson and Hill may answer and set forth the terms and conditions of the said agreement and understanding made or had with the said Smith and Stevens in respect to said enterprise and undertaking; and the amount of said bonds purchased or acquired, and the cost thereof; and all expenses connected with and incident to said enterprise; and the amount of money, if any, actually furnished by them, and when, in connection with said enterprise; and the amount furnished by said Smith and Stevens, and when, and how, and when and for what all moneys so furnished were paid out; and when, how, and from what source the same have been repaid; and what dividends or profits in money, bonds, stocks, and other effects have been made, turned over to, or received by them, the said Kittson and Hill, or either of them, resulting from or appertaining to said enterprise; and that the said defendant railway company may also more especially set forth what moneys, bonds, stocks, and other effects have been paid or turned over by it to or for the said defendants Kittson and Hill, and upon what consideration; and also what property is now held by it, and what lands and other property have been sold by it, and when, and to whom, and upon what consideration; and also what use has been made of the bonds, and of the proceeds thereof, which have been issued by said railway company, and secured by mortgage upon its property:

And that an account may be taken by and under the order and direction of this honorable court, of all moneys paid out, and of all property and effects acquired by, under, and pursuant to said undertaking and enterprise, and of the dispo-

sition made thereof; and of the property acquired by said defendant railway company; and of the disposition made of the bonds, or proceeds thereof, which have been issued by said defendant railway company; and of the moneys, bonds, stocks, and other effects which have been received by said defendants Kittson and Hill, or either of them, as profits, avails, or results arising or accruing from said enterprise and undertaking; and of all other matters appertaining to said enterprise; and that the said Kittson and Hill be ordered, adjudged, and decreed to pay and turn over to your orator one-third of all moneys, bonds, stock, and effects that shall be found to have been received by them, resulting or accruing from said enterprise and undertaking; and that your orator be decreed and adjudged to be entitled to an equal interest with said Kittson and Hill in said enterprise and undertaking, and in the benefits, avails, and profits resulting therefrom; and that said defendant railway company be decreed and adjudged to issue to your orator his just and due proportion of its capital stock, and to account to your orator for his proportion and share of the property which has come to its possession, for the avails, results, and profits thereof, and to recognize the rights of your orator in the stock and property of said company, as equal with the said Kittson and Hill; and that your orator may have such other and further relief in the premises as the nature of the case may require, and to this honorable court shall seem meet:

May it please your honors to grant unto your orator a writ of subpœna of the United States of America issuing out of, and under the seal of, this honorable court, directed to the said Norman W. Kittson, James J. Hill, and the St. Paul, Minneapolis & Manitoba Railway Company, defendants, commanding them and each of them, on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and sin-

gular the premises, and to stand to, perform, and abide such further order, direction, and decree as may be made against them.

GILMAN & CLOUGH,
GRIFFITH & KNIGHT, AND
C. K. DAVIS,
Solicitors for Complainant.

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ANSWER

OF ALL THE DEFENDANTS

[*Filed June 6, 1887.*]

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MINNESOTA.

IN EQUITY.

JESSE P. FARLEY

vs.

NORMAN W. KITTSON, J. J. HILL, AND THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

The joint and several answers of Norman W. Kittson, J. J. Hill, and the St. Paul, Minneapolis & Manitoba Railway Company, the defendants, to the bill of complaint of Jesse P. Farley, complainant.

These defendants, now and at all times saving and reserving unto themselves and each of them all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material

or necessary for them or any of them to make answer unto, these defendants severally answering, say:

I.

That it is not true that in the summer of 1876, or at any other time, the defendants Kittson and Hill, or either of them, made with the plaintiff the agreement mentioned in subdivision I of said bill of complaint, or any agreement whatever for the purchase on joint account with the plaintiff of any of the bonds of the First Division of the St. Paul & Pacific Railroad Company, or of the St. Paul & Pacific Railroad Company, or any agreement whatever to become purchasers of or to acquire all or any of the lines of railroad or of any other property of either of said companies, either by means of a purchase of such bonds, or any of them, or otherwise, or that the said defendants, or either of them, or the plaintiff, ever engaged in the enterprise or the undertaking in said bill, and particularly in said subdivision I thereof mentioned.

And they deny that said defendants Kittson and Hill, or either of them, ever did or agreed to do anything under or in pursuance of said pretended agreement in said subdivision I of said bill mentioned, or to carry out the pretended enterprise and undertaking therein mentioned.

And they deny that the defendant Kittson ever made any of the representations in said subdivision I stated to have been made by him.

And these defendants deny that it was ever agreed between plaintiff and the defendants Kittson and Hill, or either of them, that the defendant Kittson might use or give to Donald A. Smith, in said bill mentioned, or to any other person, any interest in any purchases of bonds or other property of said railroad companies, or either of them, or in the pretended enterprise mentioned in said bill, or that any interest in the

pretended purchases or the pretended enterprise mentioned in said bill should be held for the benefit of said defendants and plaintiff, or for any of them.

And these defendants deny that said defendants Kittson and Hill, or either of them, ever made with the plaintiff any agreement whatever in respect to the conduct or management of any negotiations or the details of any negotiations for procuring any funds, or for the purchase of the bonds or any of them mentioned in said bill.

And they deny that said Kittson and Hill, or either of them, ever agreed with the plaintiff that he, the plaintiff, should furnish such facts, information and advice, or that he should render such aid and assistance in any such or any negotiations as should be required of him, or that he should furnish any facts, information or advice, or should render any aid or assistance in said or any negotiations.

And these defendants deny that the plaintiff had any knowledge not possessed by the defendants Kittson and Hill as to the whereabouts or the situation of the bonds, or any of them, in said subdivision I of said bill mentioned, or as to the rated value thereof by the holders, or as to the mode whereby or the channel through which the same could be reached or procured, or in respect to the situation, amount, character, or value of the lines of railroad or property mortgaged to secure said bonds, or in respect to the pending suits, or any of them, for the foreclosure of the mortgages, or any of them, securing said bonds, or that the plaintiff's services in respect to any of said matters, or his co-operation, was indispensable to the success of the pretended enterprise alleged in said bill.

II.

Further answering unto said bill, and especially unto subdivision II thereof, these defendants deny that the defendant Kittson ever made any of the arrangements or did any of

the things in said subdivision stated to have been done by him.

And they deny that he ever made any arrangements with or procured either said Donald A. Smith or George Stevens in said bill mentioned, or any other person, to join in the pretended enterprise in said bill mentioned, or to furnish any funds to purchase or secure control or use of said bonds, or to carry out the pretended undertaking in said bill mentioned. And they deny that said defendant Kittson agreed to give said Smith and Stevens or to any one any fractional or other interest in said pretended enterprise; and they deny that any balance in said pretended enterprise not agreed to be given to said Smith and Stevens, or that any interest in any enterprise for purchasing said bonds, or for acquiring said mortgaged railroads and property, ever belonged to plaintiff and Hill in equal proportions, or in any proportions or at all, either under the pretended agreement set forth in said bill or otherwise.

III.

Further answering said bill, and especially subdivision III thereof, these defendants deny that at any time any negotiations were opened or carried on by said Smith, Stevens, Kittson, Hill and the plaintiff, or by any of them, for the purchase of any bonds in pursuance of the pretended understanding and agreement mentioned in the said bill appertaining to the pretended enterprise therein mentioned, or that they or any of them purchased or secured a large quantity of, or any bonds, as a result of any such negotiations.

And they deny that said Smith, Stevens, Kittson and Hill, or any of them, ever negotiated for or purchased any bonds of the St. Paul & Pacific Railroad Company or of the First Division of the St. Paul & Pacific Railroad Company, either in conjunction with the plaintiff or under or in pursuance of any agreement or understanding with plaintiff, or that the

plaintiff ever had any interest in, or took any part in, any negotiations for or purchases of any of such bonds that were ever made by said Smith, Stevens, Kittson and Hill, or by any of them. And they deny that said Kittson and Hill ever negotiated for or purchased any of such bonds except as hereinafter in this answer stated.

And they deny that in any negotiations for purchase of any of said bonds or in the purchase thereof, the plaintiff was continuously or ever called on by said Kittson and Hill, or either of them, for facts, information, advice, or co-operation in respect thereto, or that plaintiff furnished or rendered the same, or any of them, either pursuant to the pretended understandings or agreements mentioned in said bill or otherwise. And they deny that the said pretended negotiations, or any negotiations, received any aid whatever from any advice or co-operation of the plaintiff or from any facts or information particularly within his knowledge, or that any advice or co-operation, or any such facts or information, were ever rendered or imparted by plaintiff to said Kittson and Hill, or either of them, under the pretended understandings and agreements mentioned in said bill or otherwise.

And they deny that any of the purchases of bonds mentioned in the said bill were made under the agreements with the holders thereof stated in the third subdivision of said bill, or were made at all, or that any of the parties mentioned in the bill ever had the understanding mentioned therein, or any understanding at all, with the plaintiff as to a new issue of bonds.

They admit that nearly all the then outstanding bonds mentioned in said bill were in the summer of 1876 held and owned by residents of Holland, and John S. Kennedy, of New York City, was, by a committee of said bondholders, appointed, and thereupon acted as agent and attorney for certain purposes of the holders of a large majority in amount of each issue of bonds; but they deny that he had the au-

thority mentioned in said bill, or that he had, prior to December, 1877, any authority to conclude a sale of said bonds, or any of them. That these defendants are not informed by said bill as to the "fifteen million mortgage" or the "extension line" therein mentioned. But they admit, and aver it to be a fact, that in 1871 a mortgage to secure an issue of bonds of $15,000,000 was made by the said St. Paul & Pacific Railroad Company upon its lines of railroad extending from Sauk Rapids to Brainerd and from St. Cloud to St. Vincent, in the state of Minnesota, and upon the land grants and other property appertaining to said lines; and that in a suit by said John S. Kennedy and others, which suit was brought to foreclose said mortgage and for a receiver of said property, the plaintiff was by this court on the first day of August, 1873, duly appointed receiver of all the railroads and property covered by said mortgage, and that he continued to be such receiver and in possession and operation of said line of railroad from St. Cloud to St. Vincent until June, 1879, and was such receiver at the alleged making of the pretended agreement with said Kittson and Hill, mentioned in said bill.

And these defendants further admit that said Kennedy was for certain purposes agent for the holders of over $11,000,000 of the bonds secured by said $15,000,000 mortgage, and that he was plaintiff in all the foreclosure suits mentioned in said bill, except in a certain suit brought by the trustees in said $15,000,000 mortgage to foreclose the same.

And they admit that all said suits were caused to be commenced by him as agent for the bondholders, and under instructions from their said committee. And they admit that plaintiff was appointed receiver and general manager, as stated in said bill, and hereinafter more fully set forth, at the instance of said Kennedy.

And these defendants deny that the plaintiff ever, before the bringing of this suit, informed said Kennedy of his said

alleged interest and connection with the said Kittson and Hill in said alleged project of purchasing said bonds, or that said Kennedy, while any negotiations for purchasing said bonds were pending, or at any time, had full or any notice or knowledge that plaintiff was connected with said Kittson and Hill in the manner or under the pretended agreement alleged in said bill, or at all, or that plaintiff was interested in any such purchase of bonds in which said Kittson and Hill, Smith and Stevens, or any of them, were in any way interested or concerned. And they deny that said Kennedy ever approved or sanctioned the pretended interest and connection mentioned in said bill.

And these defendants say that after certain negotiations for purchase of bonds by said Kittson, Hill, Smith, and George Stephen, (which are hereinafter more particularly described,) and before the decrees of foreclosure in any of said suits, the plaintiff did falsely inform said Kennedy that the said plaintiff had been offered an interest therein by said Kittson and Hill, but did not then or at any time inform said Kennedy of the pretended agreement mentioned in said bill, and to enforce which this suit is brought, or of the nature, extent, or terms of such pretended offer of an interest, or that he had accepted or intended to accept the same. And these defendants say that such statement by plaintiff to said Kennedy was wholly false, and that said Kittson and Hill never offered plaintiff any interest in any purchase of bonds.

And these defendants say that the averments is said subdivision III of said bill in respect to the conduct of negotiations by said Kennedy, and as to the disposition made of bonds purchased, and as to recommendations made by said Kennedy, are wholly untrue so far as relates to any negotiations for purchase or any purchase of bonds, or any bonds purchased, or any transaction whatever, under the pretended agreement between the plaintiff and said Kittson

and Hill in said bill mentioned, or any transaction in which plaintiff was in any way interested.

And these defendants say that as to whether plaintiff, to any inquiries made by said Kennedy, or by any of the trustees in said mortgages, or by any of the holders of the bonds secured thereby, or by any one interested in said property under his charge as manager or receiver, gave full or true answers or information, whether to the best of his knowledge and ability or otherwise, or whether the said plaintiff kept said Kennedy fully informed of all facts, matters, and things coming to his knowledge affecting said property, these defendants know not, and have not been informed save by said bill, and cannot set forth, as to their belief or otherwise. And they deny that the plaintiff acted honestly or in good faith towards the stockholders or bondholders interested in the property under his control as receiver and general manager. And these defendants say that the plaintiff never, before the bringing of this suit, informed said Kennedy, or any of the said stockholders or bondholders, or the trustees in any of said mortgages, that he had made the agreement or had acquired the interests alleged in subdivision I of said bill. And they say that the plaintiff never informed this court, whose receiver he was, of the agreement alleged in said bill, or the enterprise therein alleged, or of his interest under said alleged agreement in said alleged enterprise for purchasing in the names of other persons the bonds secured on the property of which he was receiver, and thereby acquiring in the names of others the property in his charge as such receiver.

IV.

Further answering, these defendants admit and aver that this defendant, the St. Paul, Minneapolis & Manitoba Railway Company, is a corporation organized in May, 1879, with a capital of $15,000,000, under the laws of the state of Min-

nesota, by the defendants Hill and Kittson, and by Donald A Smith, George Stephen, and John S. Barnes, for the purpose of acquiring the Branch Line (so called) of the First Division of the St. Paul & Pacific Railroad Company, which had theretofore been sold under decree of foreclosure, and the other lines of railroad, and other mortgaged property mentioned in said bill, when the same should thereafter be offered for sale under foreclosure decrees, in case such acquisition should then be feasible or desirable. But these defendants deny that said company was organized, or that it or the persons forming it did anything, for the purpose of acquiring any property for the use or benefit in any way of the plaintiff.

They admit that at the time of exhibiting of said bill said Kittson, Hill, and Smith and George Stephen were among the directors of said company, and shared in the control and management thereof, and that all of them except said Kittson still are directors thereof.

V.

Further answering unto said bill, and particularly unto subdivision V thereof, these defendants admit that in the months of March and April, 1879, foreclosure decrees were duly taken, had, and entered in the pending suits for the foreclosure of the mortgages in said bill and hereinafter mentioned, containing the provisions mentioned in said bill, and that in the months of May and June, 1879, sales were had under said decrees, and that at each of said sales (except at the sale of said Branch Line, under the decree of foreclosure of a certain mortgage for $2,800,000, being one of the mortgages mentioned in said bill, which sale was made before the creation of said St. Paul, Minneapolis & Manitoba Railway Company) the property mortgaged and sold was purchased and acquired by said last-named company. But they deny

that any purchase or acquisition of any of said lines was in any wise for the use or benefit of the plaintiff, or that plaintiff had or was entitled to have any interest therein.

And they deny that at any sale of any of said lines under said decrees there was turned or used in payment any bonds purchased as alleged in said bill, or any bonds purchased under the pretended agreement between plaintiff and said Kittson and Hill, alleged in said bill, or any bonds in which plaintiff had or was entitled to have any interest whatever.

They admit that at each sale certain bonds theretofore purchased by defendants Kittson and Hill with said Donald A. Smith and George Stephen as hereinafter stated, were turned in and used in payment, and that said four persons also furnished the residue of the consideration on each purchase, as hereinafter stated.

But these defendants deny that the plaintiff furnished any consideration on any of said sales, or that any of the considerations (whether in bonds or otherwise) was furnished for him, or on his account in any wise, or that the consideration aside from said bonds was furnished by said Smith and Stevens, or by said Smith and George Stephen, or that any of said consideration was furnished pursuant to the pretended arrangement with them, alleged in said bill, for joining in the pretended enterprise in said bill alleged.

They deny that any of the 500 miles of railroad and other property in said subdivision V mentioned was, by means of said alleged or any purchase, or otherwise, ever acquired by or vested in said defendant railway company for the use and benefit of plaintiff and said Kittson, Hill, Smith, and Stevens, and they deny that the plaintiff ever had or was entitled to have, by reason of any purchase by the defendant railway company, or by reason of all or any of the matters stated in said bill, or by any other title or right, any interest, legal or equitable, in any of said property, or ever be-

came entitled to claim that any of said property was acquired by or vested in said railway company for the use of himself, or for the use of himself and any other person or persons.

And these defendants deny that said Smith or said George Stephen ever had any notice or knowledge that plaintiff was jointly or equally or in any wise interested with said Kittson and Hill, either in any purchase of any bonds, or in the pretended undertaking and enterprise mentioned in said bill. Nor did either said Stephen or said Smith or said Company ever have any knowledge, notice, or information of any claim by plaintiff of any interest with said Kittson and Hill in any purchase of bonds, or of any claim by plaintiff that the undertaking and enterprise mentioned in said bill ever existed, until after the plaintiff, in June, 1879, brought a suit against these defendants in the district court of the state of Minnesota, for the same relief which he prays for in his bill of complaint in this cause.

VI.

Further answering, these defendants admit that on June 21st, 1879, the defendant railway company, acting by its board of directors, among whom were defendants Kittson and Hill and George Stephen and Donald A. Smith, issued and negotiated the bonds and executed the mortgage in subdivision VI of said bill mentioned. But they deny that any of said bonds or the proceeds thereof were used to pay the cost of any bonds purchased, as stated in the said bill, or of any bonds purchased under any of the agreements, understandings, or arrangements in said bill alleged, or of any bonds in the purchase of which the plaintiff ever was or was to be in any wise interested or concerned, or to pay any expenses incurred or incident to the pretended enterprise alleged in said bill, or any enterprise in or with which plaintiff was ever in any wise interested or concerned.

VII.

Further answering unto said bill, and particularly unto subdivision VII thereof, these defendants admit that from June 21, 1879, to the exhibiting of said amended bill, the defendant railway company, under the control and management of George Stephen, Donald A. Smith, Norman W. Kittson, and James J. Hill, has been (and that said company is still) in possession of all the railroads mentioned in the said bill, and of all or the greater part of the lands and other property in said bill mentioned, and has operated said railroads, and has received over $500,000 over and above operating expenses and interest on said $8,000,000 mortgage, and has sold large quantities of land and other property, (but not any lands or property acquired as alleged in said bill,) and realized from said land sales large sums of money, which moneys have been paid over to the trustees of said $8,000,000 mortgage, as therein required, and that said company has also made expenditures in connection with said property.

VIII.

Further answering said bill, and especially subdivision VIII thereof, these defendants deny that the capital stock of said defendant railway company represents any property acquired by the said company in the manner or by the means stated in said bill, or any profits arising or resulting from the pretended enterprise alleged in said bill, or from any enterprise in or with which plaintiff was ever in any wise interested or connected. And they deny that any profits have been realized in any wise from said pretended enterprise, or have been divided.

They admit the issuance to each of the defendants Kittson and Hill in his own name and right of 28,823 shares of the

capital stock of said company of the par value of $100 per share, and that stock is worth par value. But they deny that said stock, or any of it, is a portion or part of any stock to which the plaintiff and said Kittson and Hill are entitled, or in which plaintiff has any interest, either under the pretended arrangement made with said Smith and Stevens, alleged in said bill, or under any other arrangement.

IX.

Further answering unto the plaintiff's said bill, and particularly unto subdivision IX thereof, these defendants say that defendants Kittson and Hill never heard of the pretended agreement and understanding, or of the pretended enterprise in said bill alleged, until after the plaintiff, in June, 1879, brought his said suit in the district court of the state of Minnesota. And they say that neither defendant Kittson nor defendant Hill ever admitted or recognized that plaintiff was entitled to any share in any purchase of the bonds in said bill and in this answer mentioned, or in any property acquired by means of any such bonds, or the existence of any understanding or agreement, entitling him to any share therein. Nor did either of them ever make any suggestion or intimation to the plaintiff of or concerning in any manner any share of plaintiff in the pretended enterprise alleged in said bill, or in any purchase of said mortgage bonds or said mortgaged railroads and property.

And these defendants deny that they or any of them have ever colluded or confederated with any person to wrong or defraud the plaintiff, or ever wronged or defrauded him. And they deny that said Kittson and Hill, or either of them, ever claimed to have advanced money in carrying out the pretended enterprise alleged in said bill, or that these defendants, or either of them, ever received any results, avails, or profits of the pretended enterprise alleged in said bill.

X.

Further answering unto plaintiff's said bill, these defendants say that the bonds and mortgages, and the property embraced in said mortgages, which are mentioned, but not described, in said bill, were as follows: That the bonds of the St. Paul & Pacific Railroad Company were bonds of an issue of twelve hundred thousand dollars, made and executed by said St. Paul & Pacific Company, bearing date the second day of June, 1862, and which bonds were secured by a mortgage or trust deed of the same date, made and executed by said St. Paul & Pacific Company to Edmund Rice, Horace Thompson, and Samuel J. Tilden, as trustees, by which trust deed or mortgage the said St. Paul & Pacific Company conveyed to said trustees all that portion of its line of railroad extending from the city of St. Paul, via St. Anthony, to the town of Watab on the Mississippi River, together with all structures, grounds, equipments, and rolling stock belonging to said portion of its line so conveyed, and all its rights, privileges, and franchises appertaining to said line of road so conveyed, including the franchise to be a corporation, then held or which should thereafter be acquired by said company, and also the lands granted by the congress of the United States to aid in the construction of said road, and which then had been or should thereafter be acquired by said company under the act of congress making said grant.

That in the summer of 1876, the said Samuel J. Tilden resigned his office of trustee under said trust deed or mortgage, and said John S. Kennedy was, pursuant to the terms thereof, duly appointed trustee in his place.

That the bonds of the First Division of the St. Paul & Pacific Railroad Company, (which will be hereinafter styled the First Division Company,) mentioned in said bill, were bonds

of the following issues, and were all made and executed by said company:

1. An issue of two million, eight hundred thousand dollars, the bonds of which issue bore date and were issued on the first day of September, 1865, and were payable, with interest semi-annually at the rate of seven per cent. per annum, on the first day of December, 1895; which said bonds were secured by a mortgage or trust deed made by said First Division Company (which had succeeded said St Paul & Pacific Company in the ownership of all the property embraced in the $1,200,000 mortgage or trust deed hereinbefore mentioned) to George L. Becker, George T. M. Davis and the said Horace Thompson, as trustees, by which mortgage or trust deed the said First Division Company did convey to said trustees, in trust to secure the payment of the principal and interest of said bonds, all the property described in said mortgage of June second, 1862, and also certain other lands to the amount of four sections per mile, which had been granted by congress to aid in the construction of said line, which said mortgage or trust deed bore date the 1st day of September, 1865.

2. An issue of bonds to the amount of three millions of dollars, bearing date on the first of March, 1864, payable May 1st, 1894, with interest payable semi-annually on the first days of May and November in each year, at the rate of seven per cent. per annum; which said bonds were secured by a mortgage or trust deed bearing date March 1st, 1864, made by said First Division Company to Edmund Rice, Horace Thompson, and Samuel J. Tilden aforesaid, upon that part of its line of railroad known as its Main Line, extending from St. Anthony aforesaid, to a point 150 miles westerly therefrom, and the appurtenances, equipment, and corporate franchises pertaining thereto, then held, or which might thereafter be acquired by said First Division Com-

pany, and also the land grant of six sections per mile with which said company was endowed by act of congress to aid in construction of said line.

3. An issue of bonds to the amount of $6,000,000, bearing date July 1st, 1868, and payable July 1st, 1898, with semi-annual interest at seven per cent. per annum, payable on the first day of May and November in each year; to secure the payment of which bonds and interest the said First Division Company did, by a trust deed or mortgage bearing date said July 1st, 1868, convey unto the said George L. Becker, Horace Thompson, and Samuel J. Tilden, trustees, its entire Main Line, extending from St. Anthony aforesaid, to Breckenridge, a distance of 207 miles, (and including the 150 miles embraced in said $3,000,000 mortgage,) together with all appurtenances, equipments, corporate franchises, including the franchise to be a corporation, belonging or anywise appertaining to said Main Line, and also all lands granted by congress to aid in the construction thereof, except the lands embraced in the said $3,000,000 mortgage.

4. An issue of bonds to the amount of fifteen million dollars, made and issued by said First Division Company, bearing date the first day of April, 1871, and payable thirty years thereafter, with interest at seven per cent. per annum, payable semi-annually on the first days of January and July in each year; the payment of the principal and interest of which bonds was secured by a mortgage or trust deed bearing date April 1, 1871, made by said St. Paul & Pacific Company to the said George L. Becker and Horace Thompson and one Wm. G. Moorhead, as trustees, whereby the said St. Paul & Pacific Company conveyed to said trustees its lines of railroad extending from St. Cloud to St. Vincent, in Minnesota, a distance of about 310 miles, and from Watab aforesaid, to Brainerd, in said state, a distance of about sixty miles, together with the equipments, appurtenances, rights,

privileges, and franchises, including the franchise to be a corporation, appertaining thereto, then owned or held, or which should thereafter be acquired by either of said companies, and also the lands granted by congress to aid in the construction of said lines of road.

That in the year 1873, said John S. Kennedy, with John S. Barnes and Henry M. Baker, on behalf of themselves and all the bondholders under the $15,000,000 mortgage hereinbefore mentioned, filed their bill in equity in this court against the railroad companies hereinbefore mentioned and other defendants, praying, among other things, that a receiver be appointed of all and singular the property, rights, and franchises of said St. Paul & Pacific Company covered by said $15,000,000 mortgage; in which suit such proceedings were had that by order of this court, duly made on the 1st day of August, A. D. 1873, the said Jesse P. Farley, plaintiff herein, was duly appointed receiver of the lines of railroad of the said St. Paul & Pacific Company covered by said $15,000,000 mortgage, and of all equipments, rolling stock, machinery, and appurtenances, and all property, rights, and franchises appertaining to said lines of railroad, or either of them, then held or thereafter to be acquired by said St. Paul & Pacific Company.

That said plaintiff, Jesse P. Farley, duly accepted such trust as such receiver, and duly qualified as such, and took possession of said lines and property, and retained possession thereof, and operated said lines or portions thereof, until the same were by order of this court turned over to the purchaser thereof, as hereinafter stated.

That prior to October 9th, 1876, George T. M. Davis, one of the trustees of said $2,800,000 mortgage, resigned his trusteeship, and George L. Becker, another of said trustees, was removed from his trusteeship therein, and said John S. Kennedy was appointed trustee in place of said Davis resigned.

That prior to October 9th, 1876, said Samuel J. Tilden resigned his trusteeship under said $3,000,000 mortgage, and said John S. Kennedy was appointed trustee in his place.

That on said 9th day of October, 1876, the said Rice, Thompson and Kennedy, as trustees in the said $1.200,000 mortgage, took possession of all the property, including the line of railroad, covered thereby, except the land grant appertaining to said road; and on the same day, as trustees in the said $3,000,000 mortgage, took possession of the railroad and appurtenances covered thereby.

And that on the same day the said Thompson and Kennedy, as trustees of the $2,800,000 and $6,000,000 mortgages, respectively, took possession of the lines of railroad and property (except the land grants) covered by said mortgages respectively.

That in each case the persons so taking possession claimed to do so as trustees, and under power in that behalf conferred by said mortgages respectively.

That from the time they so took possession, and down to the time when said railroads were sold under the decrees of foreclosure mentioned in said bill, and turned over to the purchasers thereof after the confirmation of said respective sales, the said trustees held and operated the same respectively; and during all said period the plaintiff, Jesse P. Farley, was general manager of said lines for said trustees, and had full control of the management thereof; and the said plaintiff continued to be receiver of said lines and property of the St. Paul & Pacific Company covered by said $15,000,000 mortgage, and to manage and operate said lines, or such part thereof as was from time to time constructed and fit for operation, down to the time when said lines and other property were sold by this court under a decree of foreclosure of this court, and said sale was confirmed by this court, and until, by order of this court, possession of said lines and property was delivered to the defendant the St. Paul, Minne-

apolis & Manitoba Railway Company, as the purchaser at such sale; and that the said Farley had not been discharged by this court as such receiver, and had not settled his final accounts as such, at the date of the bringing of this suit.

And these defendants say that as receiver of said lines and other property covered by said $15,000,000 mortgage, the plaintiff could not lawfully make the pretended agreement with Kittson and Hill alleged in said bill for the purchase of the mortgage bonds secured on said property, and the purchase of said mortgaged property, of which he was at the alleged time of making such pretended agreement the receiver as aforesaid; nor was it lawful for him to engage in the pretended enterprise for purchasing such bonds and property, which is alleged in said bill.

And they say that said pretended agreement, if ever made, (which these defendants do in no wise admit,) was against public policy, and was in its inception, and has always been, wholly void; and that the making of such an agreement, and the embarking in such an enterprise as that alleged in said bill, was a breach of trust on plaintiff's part as such receiver, and a violation of the duties owing by him as such receiver to all persons interested in said property, and to this court, whose receiver he was.

And these defendants say that as general manager for the trustees in said mortgages of the lines of railroad of said First Division of the St. Paul & Pacific Railroad Company, the said plaintiff held a position of trust and confidence toward his employers, the said trustees in possession of said lines, and toward the stockholders in said company and the holders of the bonds secured by said mortgages, and could not lawfully make the said pretended agreement with said Kittson and Hill, or engage in said pretended enterprise for purchasing said bonds and mortgaged property, which are alleged in said bill; but such agreement, if ever

made, was in its inception, and has always been, against public policy, and utterly void.

And these defendants say that by reason of the said illegality of said pretended agreement and said pretended enterprise, the plaintiff is not entitled to maintain this or any other suit or action founded upon and brought to enforce the said pretended agreement, or any rights claimed to have arisen therefrom.

XI.

Further answering the plaintiff's said bill, these defendants say that in the spring of the year 1877, the defendants Kittson and Hill, together with George Stephen and Donald A. Smith, agreed with each other to engage in the purchase, on their joint account, of the mortgage bonds in the last preceding subdivision of this answer described, in case a sufficient number thereof could be obtained at prices and on terms that should be satisfactory, and to dispose for their joint account of the bonds so purchased, either by use thereof in acquiring the property mortgaged to secure the same, or in such other manner as should appear to be most feasible and profitable to them.

That the plaintiff was not a party to such agreement, nor was he in any way interested therein, nor did any of the parties thereto intend or contemplate that the plaintiff had or was to have any interest therein or in any of the bonds or other property, or in any profits whatever, that might be acquired in the carrying out of said agreement.

That all the bonds of said issues had been originally negotiated in Holland, and nearly all of such bonds then outstanding were then held in Holland, and a large number thereof were held by a committee theretofore appointed by said Dutch bondholders, and commonly known as the Dutch Committee, which facts, as well as the names and residences of the persons constituting said committee, had been matters

of common knowledge and notoriety in the city of St. Paul ever since the year 1873.

That the bonds of each issue mentioned in said bill and in this answer, and the past-due coupons thereof, were receivable at par in payment for lands comprised in the land grant upon which such issue of bonds was secured; and in the summer of 1876, and during several years prior thereto, said bonds (which were greatly depreciated in value) were in active demand in the city of St. Paul for use in payment for such lands, and for that use were freely bought and sold in Holland, to be transmitted to St. Paul, and had a price and value generally known both in Holland and in St. Paul.

That prior to the making of their said agreement, the said four persons had fully informed themselves as to the situation, amount, character, and value of the lines of railroad and property mortgaged to secure said bonds, and in respect to the pending suits for the foreclosure of said mortgages, and as to the whereabouts and situation of said bonds, and the mode whereby and the channel through which the same could be reached and procured, and were familiar with the current prices thereof. That as to none of these matters did the plaintiff have, nor was he believed by any of said persons to have, any peculiar or special knowledge, nor did they at any time resort to him for or receive from him any information on any of said points.

That the rated value, by the holders thereof, of the bonds held by said Dutch Committee upon a sale in gross of all or the greater part thereof was not known to the plaintiff, and could only be arrived at by negotiations with said committee; and accordingly, and in May, 1877, the said four persons, pursuant to their said agreement, opened negotiations with said committee for the purchase of the bonds so held by them, which negotiations continued with some interruptions until the following winter, when the conduct thereof on behalf of said committee was by it entrusted to John S. Kennedy, of

the city of New York, in said bill mentioned, and said negotiations were thereupon continued with said Kennedy as the agent for that purpose of said committee until February 24th, 1878, when said purchase was concluded. That thereupon the formal contract of purchase which had theretofore been drawn up and had been agreed to by said committee through their said agent, was transmitted to Holland for execution by said committee, by whom it was executed on or adout March 13th, 1878, which date was accordingly inserted in said formal contract as the date thereof. And these defendants believe that said Kennedy recommended to said committee a sale of the bonds mentioned in said contract upon the terms therein set forth.

And for the terms of said agreement these defendants refer to the original thereof, when the same shall be produced, and to Schedule A, hereto annexed, and made part of this answer, which is a true copy of said agreement, except certain schedules and *memoranda* appended thereto.

That the plaintiff took no part whatever in any of the negotiations which resulted in the making of the said agreement with said Dutch Committee, or in the making of such agreement, nor was he at any time during said negotiations, or in the purchase effected by said agreement, or in any purchases of bonds made by said Smith, Stephen, Kittson and Hill, ever called upon by said Kittson and Hill, or either of them, for any facts, information, or advice, nor did he ever furnish or render the same or any of them. And they deny that the success of said negotiations was in any way owing to any advice or co-operation of the plaintiff, or to any facts or information peculiarly within his knowledge, or to any facts or information imparted by him to said Kittson and Hill, or either of them, or to any other person.

And these defendants say that in making said agreement with said Dutch Committee, and the purchase of bonds thereby effected, the said Smith, Stephen, Kittson and

Hill, and each of them, acted and intended to act solely for themselves, and no one of them acted or intended to act for or on account of the plaintiff, or under any agreement, understanding, or arrangement with the plaintiff, or intended to make an agreement in which, or in the property acquired or to be acquired by means thereof, the plaintiff was or was to be in any wise interested.

Further answering, these defendants say that, after the making of said agreement with said Dutch Committee, a further and supplemental agreement was made between said Smith, Stephen, Kittson and Hill and said Dutch Committee, whereby the holders of bonds, other than the bonds held by the committee, might within a limited time dispose of them to said four persons at the prices and on the terms in said agreement dated March 13th, 1878, set forth, which time was thereafter extended, but with a reduction in the price of certain of said bonds.

That the said Smith, Stephen, Kittson and Hill, under said agreement of March 13th, 1878, did not acquire all, but did acquire much the greater part of the bonds therein mentioned. That additional bonds were acquired by them under said additional agreements, and other purchases of bonds of said several issues were made by them in their own names and for their own use and benefit (but in no wise for the use or benefit of plaintiff) in the cities of New York and St. Paul.

That the various sums required by said agreement with said Dutch Committee to be paid prior to the issue of bonds of the new or consolidated company therein provided for, and the price of all bonds bought as aforesaid in St. Paul and New York, and all other sums paid out in carrying out said agreement between said Smith, Stephen, Kittson and Hill and said Dutch Committee (including the sums required to be paid in cash, and not by use of bonds, at the purchases at the several sales under the foreclosure decrees) were furnished under and pursuant to their agreement by each and

all of them, and were not, nor was it ever agreed that such moneys should be, furnished by said Smith and Stephen only. And that the greater part of said moneys, amounting to many hundred thousands of dollars, was procured by said Smith, Stephen, Kittson and Hill on the negotiable paper of all of them, secured by pledge of collaterals of said Kittson and Hill, as well as of said Smith and Stephen.

And these defendants say that much the greater part (but not all) of the bonds so as aforesaid bought by said Smith, Stephen, Kittson and Hill were used in payment on the purchase of said mortgaged lines and property under said foreclosure decrees; and that a small portion of such bonds were, prior to such sales, used in payment for lands covered by the mortgages by which the bonds so used were secured.

And these defendants say that all the provisions of said agreement with said Dutch Committee by said Kittson, Hill, Smith and Stephen to be performed, were by them fully kept and performed in accordance with the terms thereof, and that each of the articles of said agreement was fully carried out according to its terms, except that (it being found impracticable to follow literally the terms of the 20th article thereof) a further agreement was on May 23rd, 1879, made between said four persons and the trustees named in said agreement of March 13th, in respect to the use of such bonds, and the mode in which title should be taken at purchases of the mortgaged property under the decretal sales.

And these defendants say that on May 7th, 1879, the said Branch Line was sold under the decree for the foreclosure of said $2,800,000 mortgage, and was purchased by John S. Barnes, (one of the trustees named in said agreement with said Dutch Committee,) as trustee under said agreement, and thereupon, and on May 23rd, 1879, the said Barnes, and said Smith, Stephen, Kittson and Hill, did organize this defendant railway company, as hereinbefore in this answer stated, and said company did thereupon acquire the property

so purchased, and did thereafter, at the sales of the mortgaged lines and other property under the decrees of foreclosure of such mortgages, purchase the property so mortgaged and sold, and did use in making payment the bonds so as aforesaid bought by said Smith, Stephen, Kittson and Hill, (except such as had theretofore been used in payment for land as aforesaid,) said bonds and the overdue coupons thereto annexed being used and received as cash to the amount of the dividend payable thereon under said decrees, from the proceeds of such sales.

And these defendants say that all of the consideration (whether in bonds or money) paid upon said decretal sales, was provided and furnished by said Smith, Stephen, Kittson and Hill, under their said agreement between themselves, and for their joint account, and no part thereof was furnished by, for, or on account of the plaintiff, or under any agreement or arrangement with plaintiff. Nor were any of the purchases at said decretal sales made or intended to be made by the nominal purchasers, or by said Smith, Stephen, Kittson and Hill, or by any of them, in any wise for the use of the plaintiff.

And these defendants deny that the property, or any of it, acquired by said defendant railway company by means of said decretal sales was acquired or became vested in it for the use and benefit of plaintiff in any wise or to any extent or degree whatever. And they deny that said defendant railway company, or said Smith or said Stephen, ever had any notice or knowledge that the plaintiff ever had any interest in the bonds, or any of them, so as aforesaid purchased by said Smith, Stephen, Kittson and Hill, or in the agreement of said four persons hereinbefore mentioned, or in any transactions under said agreement.

And these defendants say that the issue of $8,000,000 of first mortgage bonds of this defendant railway company, made June 21st, 1879, and the proceeds thereof, were not enough

to pay for the bonds so bought by said Smith, Stephen, Kittson and Hill, and the moneys expended by them, as required by their said agreement with said Dutch Committee, and the moneys furnished by them for the cash payments made on said decretal sales, and their other outlays and expenditures under the said agreement between them, in acquiring said bonds and said mortgaged property.

And they say that at no time did said Kittson and Hill, or either of them, ever admit or recognize that the plaintiff ever had any share or interest either in their said agreement with said Smith and Stephen, or in any of the transactions thereunder, or in the bonds so as aforesaid purchased by them, or in the said mortgaged property purchased as aforesaid, or in any shares of stock in said defendant railway company. Nor did they or either of them ever hear of any claim by plaintiff to any such interest until after he had brought his said suit in the district court of the state of Minnesota, seeking the same relief prayed in his bill in this cause, which suit was brought in June, 1879. Nor did they or either of them ever make to him any suggestion or intimation in any way admitting or recognizing him as entitled to any such interest, or as entitled to share with them, or either of them, in any of the results or profits accruing from the transactions hereinbefore set forth.

And these defendants say that the bonds so as aforesaid purchased by said Smith, Stephen, Kittson and Hill, under and pursuant to their said agreement with each other, were the only bonds used in the purchase of any of said lines of railroad or other mortgaged property at any of the decretal sales in said bill of complaint or in this answer mentioned; and that said purchases of bonds by said Smith, Stephen, Kittson and Hill, under and pursuant to their said agreement with each other, were the only purchases prior to July, 1879, of any bonds of the St. Paul & Pacific Railroad Company, or of the First Division of the St. Paul & Pacific Rail-

road Company, made by said Kittson and Hill, or in which said Kittson and Hill were in any wise interested.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without this that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, and avoided, traversed or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges, in this behalf most wrongfully sustained.

NORMAN W. KITTSON,
JAS. J. HILL,
Defendants.

THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.
By JAS. J. HILL,
President.

Attest:
E. SAWYER,
Secretary.

[Corporate Seal.]

GEO. B. YOUNG,
R. B. GALUSHA,
H. R. BIGELOW,
Solicitors and counsel for defendants.

The answer of the defendant the St. Paul, Minneapolis & Manitoba Railway Company was taken before me this 6th day

of June, A. D. 1887, under the common seal of said corporation, as by their said seal affixed appears.

OSCAR B. HILLIS, Clerk.

[Seal of U. S. Circuit Court.]

SCHEDULE A.

TO THE ANSWER OF N. W. KITTSON ET AL. TO THE BILL OF COMPLAINT OF JESSE P. FARLEY.

THIS AGREEMENT, made and entered into this thirteenth day of March, A. D. eighteen hundred and seventy-eight, by and between GEORGE STEPHEN, DONALD A. SMITH, NORMAN W. KITTSON and JAMES J. HILL, parties of the first part, and CHEMET & WEETJEN, KERKHOVEN & Co., LIPPMANN, ROSENTHAL & Co., WURFBAIN & SON, TUTEIN NOLTHENIUS & DE HAAN, of Amsterdam, H. C. VOORHOEVE & Co., of Rotterdam, and JOHAN CARP, of Utrecht, the Committee of the Dutch Bondholders of the SAINT PAUL AND PACIFIC RAILROAD COMPANY and of the FIRST DIVISION OF THE SAINT PAUL AND PACIFIC RAILROAD COMPANY, parties of the second part, WITNESSETH:—

ARTICLE I.

That the said parties of the first part do hereby agree to and with the said parties of the second part to purchase, and the said parties of the second part do hereby agree to sell to said parties of the first part, the following amounts of the bonds of said companies respectively, of the various issues now held by said parties of the second part, as such Committee, for the following prices, and upon the following terms, namely: Of the one million, two hundred thousand dollars

($1,200,000) Branch Line Issue, of the second of June, 1862, six hundred and twenty-five thousand dollars ($625,000) at seventy-five (75) per cent. of the par value of said bonds; of the two millions, eight hundred thousand dollars, ($2,800,000) Branch Line Issue of October 1st, 1865, seven hundred and sixty thousand dollars ($760,000) at twenty-eight (28) per cent. of the par value of said bonds; of the three million dollars ($3,000,000) Main Line Issue of March 1st, 1864, nine hundred and seven thousand dollars ($907,000) at thirty (30) per cent. of the par value of said bonds; of the six million dollars ($6,000,000) Main Line Issue of July 1st, 1868, three million, five hundred and twenty thousand dollars ($3,520,000) at thirty-five (35) per cent. of the par value of said bonds; of the fifteen million dollars ($15,000,000) issue so-called Extension Mortgage of April 1st, 1871, eleven million, four hundred thousand dollars ($11,400,000) at thirteen and three quarters (13¾) per cent. of the par value of said bonds. Said purchase prices to include all unpaid coupons belonging to said several classes of bonds, which shall pass with said bonds.

ARTICLE II.

Said bonds of said various issues are to be placed in the hands of John S. Kennedy and John S. Barnes, (composing the firm of J. S. Kennedy & Co., of the city of New York,) as joint and several trustees named in this agreement, to be held by them as such trustees, and to be delivered by them to the parties of the first part, as such purchasers, upon payment of the purchase price thereof in cash, as hereinafter mentioned. But if said payment shall be made in bonds and stock, as hereinafter provided, said bonds shall be held and controlled by said Trustees, until such final payment is made, for the purposes and uses and for the furtherance and completion of this agreement and for the purpose of completing the foreclosures herein contemplated.

ARTICLE III.

Said purchase price is to be paid on or before the expiration of six months from the date of sale of the mortgaged premises described in the various mortgages securing said various issues of bonds, respectively, under the decree of foreclosure which shall be last obtained in the various suits now pending in the district court of the county of Ramsey, state of Minnesota, and in the circuit court of the United States of the district of Minnesota, for the foreclosure of said several mortgages.

ARTICLE IV.

During the pendency of said foreclosure suits, and until the payment of the full contract price of the bonds purchased and sold under this agreement, the said parties of the first part shall pay to the said J. S. Kennedy & Co., agents for said Committee at the city of New York, upon the (22d) twenty-second days of June and December, in each year, a sum in gold coin equal to the semi-annual interest upon the gross purchase price of said bonds, as specified to be paid in cash, computed at the rate of seven per cent. per annum thereon, said interest to commence to accrue upon said purchase price from the twenty-second day of December, one thousand eight hundred and seventy-seven.

ARTICLE V.

The principal of said purchase-money is to be paid as hereinafter provided, either in gold or in first mortgage gold bonds of the company to be organized by said parties of the first part, under said foreclosure sales, pursuant to the laws of the state of Minnesota in such case made and provided. Said first mortgage gold bonds shall bear interest at the rate

of seven per cent. per annum, payable semi-annually in gold coin at the city of New York, or, at the option of the holder, in the city of London, at the rate of four shillings sterling to the dollar.

ARTICLE VI.

Said bonds are to be received at par, except as hereinafter specially provided; and if such purchase price is paid in bonds at par as aforesaid, said parties of the first part further agree to cause to be issued and to be delivered to the said parties of the second part, or to their said agents, preferred full paid stock of said new company at the rate of two hundred and fifty dollars ($250.00) for each and every one thousand dollars ($1,000) bond of said new company delivered in payment of said purchase price, as a bonus; which preferred stock shall bear a dividend not exceeding six per cent. (6 per cent.) per annum in currency; to be payable, however, only in case the earnings of said new company for each year shall be sufficient for that purpose, after payment of all proper expenses, and interest on the bonds issued as herein provided; and said interest shall not be cumulative. *And it is expressly understood*, that no liens or incumbrances shall be placed upon the said reorganized road, except the mortgage hereinafter mentioned, at the rate of not exceeding twelve thousand dollars ($12,000) per mile of completed road. The total amount of said preferred stock shall be limited to twenty-five (25) per cent. of the total bond issue herein provided for.

ARTICLE VII.

The option, as to the payment of the purchase price of said bonds in cash, or in bonds and stock as aforesaid, shall be as follows: In the first instance, said parties of the first part shall have the option of making such payment in cash,

or in the bonds and stock of said reorganized company as aforesaid, at their election: provided, however, that if said parties of the first part shall elect to make such payment in cash, any holder of the certificates issued by the said Committee, parties of the second part, for bonds purchased under this agreement, shall have the option of demanding payment for the bonds for which he holds the receipt or certificate of said Committee either in cash, or in said new bonds and preferred stock, at the rate above provided, at his election.

ARTICLE VIII.

Any holder of the said Committee's receipts or certificates, for bonds purchased under this agreement, shall have the right to demand and receive the said new bonds at ninety (90) per cent. of their par value, in payment for the bonds for which he may hold the said certificate or receipt; but in the event of his electing to do so, he shall not be entitled to receive preferred stock as above provided. The options to the holders of the certificates of said Committee, as contained in this and the preceding articles, shall be exercised and declared by said Committee, acting for said certificate holders, within sixty days after written notice to said Committee, or to the said J. S. Kennedy & Co., from said parties of the first part, stating their election in regard to the form of payment, as above provided.

ARTICLE IX.

Said parties of the first part further agree to build and complete the *Extension* line of said St. Paul and Pacific Railroad from its present terminus near Snake River to St. Vincent; the work thereon to be commenced as soon as practicable, and prosecuted with the utmost despatch, with a view to the completion of the said extension during the year 1878, if

possible. In order to secure the completion of said extension, the said parties of the first part hereby agree to make and execute their joint and several personal bond, in the penalty of one hundred thousand dollars ($100,000) as liquidated damages, conditioned for the completion of said St. Vincent Extension within two years from the date of this contract.

ARTICLE X.

It is further agreed that said parties of the first part, shall pay to said J. S. Kennedy & Co., as the agents of said Committee, in gold coin, at the city of New York, the cost of the Red River and Manitoba Railroad (known as the Breckenridge Barnes link,) at the same time as is provided for the payment for the said bonds hereby agreed to be purchased, (of which cost, in gold, satisfactory evidence is to be furnished to said parties of the first part,) with interest thereon, at the rate of seven per cent. per annum, up to December twenty-second, 1877; which cost and interest is to be taken as the cost of said railroad on that day; and said parties of the first part hereby agree to pay the interest upon said last mentioned amount, at the rate of seven (7) per cent. per annum, semi-annually in gold coin, on the twenty-second days of June and December of each year, to the said J. S. Kennedy & Co., agents of said Committee, at the city of New York, until the final payment therefor is made as aforesaid.

ARTICLE XI.

The bonds and stock of said Red River and Manitoba Railroad Company are to be deposited with said J. S. Kennedy & Co., together with a proxy or proxies, in favor of said parties of the first part, and held by them as trustees under this agreement, pending the fulfilment thereof. Said parties of the first part shall have the right of representing and

voting on said stock, through said proxy or proxies, at all meetings of said company, and of using the same, so far as shall be necessary to the control, management and operation by them of said Red River and Manitoba Railroad, and shall also be entitled to receive and expend all incomes derived therefrom, pending the final completion of this agreement.

ARTICLE XII.

Said parties of the first part having deposited, in the Bank of Montreal, in the city of New York, the sum of two hundred and eighty thousand dollars ($280,000) in gold coin of the United States, as a guarantee and security for the fulfilment of the obligations on their part expressed in this contract, (as appears by a certain letter addressed to J. S. Kennedy & Co., by said Bank, dated February 9th, 1878,) said amount shall be paid over, and the said Bank of Montreal is hereby directed and authorized to pay over the same, to the said J. S. Kennedy & Co., as agents for said Committee as aforesaid, without further or other order or directions from said parties of the first part, upon delivery to the said George Stephen (of the parties of the first part,) at the Bank of Montreal in the city of New York, of this agreement duly executed by said party of the second part, together with a declaration in writing by John S. Kennedy and John S. Barnes, composing said firm of J. S. Kennedy & Co., in the form subjoined to this agreement, stating that they hold in their hands, as joint and several trustees named in said agreement, the bonds and stock purchased hereunder, upon the terms, conditions, and trusts herein expressed; and it is understood and agreed that this payment is received by said Committee in full satisfaction of all expenses, disbursements and liabilities heretofore incurred by them in behalf of said Dutch Bondholders; it being the intent of the parties to this agreement that the purchasers of said bonds are not, in any

manner, to be held in any further or other sum for any expenses or liabilities incurred by said Committee in behalf of the holders of said bonds, or of said Committee's certificates.

ARTICLE XIII.

Said parties of the first part further agree that in case they shall elect to pay for said purchase in bonds and stock as aforesaid, or in case any of said bondholders shall elect to receive payments in said bonds and stock as aforesaid, the issue of bonds proposed under this agreement upon the line of said railroads, as reorganized, shall not exceed twelve thousand dollars ($12,000) per mile of finished road.

ARTICLE XIV.

It is further understood that the six (6) pending foreclosure suits in the district court of the county of Ramsey, Minnesota, and in the circuit court of the United States for the district of Minnesota, in the names of Edmund Rice and others, Trustees; of Horace Thompson and others, Trustees; of Jacob S. Wetmore and others, Trustees; and of John S. Kennedy and others, plaintiffs; and the suit of the First Division of the Saint Paul and Pacific Railroad Company against Edmund Rice, Horace Thompson, John S. Kennedy, Jesse P. Farley and John S. Barnes, commenced in June, 1877, in the district court of Ramsey county, Minnesota,—shall be controlled and conducted by the said parties of the second part, or their agents, in concert with and under the advice and instructions of the said parties of the first part, as purchasers of said bonds, free from all expense to said parties of the second part from and after the said 22d day of December, 1877: *provided*, that nothing shall be done to delay the prosecution of said suits to their final ending.

ARTICLE XV.

It is further understood that, in case the trustees now in possession of said First Division of the Saint Paul and Pacific Railroads shall hereafter make any division of the earnings of said railroads now in, or hereafter to come into, their hands, the share of such earnings belonging to the bonds so purchased by said parties of the first part, as aforesaid, shall be paid to them by said trustees, at the time of making such division.

ARTICLE XVI.

It is further agreed that said parties of the first part shall have the right, at any time during the pendency of this agreement, to demand and receive from said John S. Kennedy and John S. Barnes, the trustees holding said bonds, such amounts thereof as they may call for, upon payment in cash to said J. S. Kennedy & Co., as agents of said Committee, of the purchase prices aforesaid for the bonds so withdrawn by them: *provided, however*, that such withdrawal shall not affect the option of the owner or owners of the certificates issued by said Committee, representing the bond or bonds so withdrawn, to the payment therefor in bonds and stock as above provided, and that the amounts of bonds remaining in the hands of said trustees pending said foreclosures shall not at any time be reduced by such withdrawal below sixty (60) per cent. of the total amount of the outstanding bonds of each respective issue, at the time of such withdrawal; and the bonds so withdrawn shall be retired by exchange for the lands of the companies, as provided in the several mortgages, and shall be withdrawn and used only for that purpose.

ARTICLE XVII.

In case any bonds are withdrawn from the trust deposit, as hereinbefore provided, the cash paid in to said agents of said committee, in lieu of the bonds so withdrawn, shall be held by them until the final payments are made as herein provided; when said sum and its accumulations shall be paid over to the trustees to be named in the First Mortgage of the new company herein provided to be organized, and said sum shall be held by said trustees as a sinking fund, to be applied to the payment of the bonds to be issued under said new mortgage, according to the terms thereof; which shall provide for the application of said trust fund to the purchase of said bonds at the lowest market price, or by lot, at a premium of five per cent. on the par thereof.

ARTICLE XVIII.

It is further agreed, that any mortgage which shall be executed upon said proposed reorganized railroads, and the bonds secured by said mortgage, (in case any of said bonds shall be used in carrying out this agreement,) shall be satisfactory to said J. S. Kennedy & Co., and shall before execution be approved by them, as to substance and form, as to the trusts created, and as to the trustees appointed in and by said mortgage, and shall cover all the property of every kind belonging to said new company at the time of the execution thereof, including its land grants; and shall provide that said bonds shall be receivable at par in payment for the lands of said company.

ARTICLE XIX.

It is further agreed that in the event of the loss or destruction of any of said bonds by fire or shipwreck, during their

transit from Europe to the city of New York, the said parties of the first part will accept, as proof of said loss, a notarial certificate in usual form, attested by an United States consul, setting forth the numbers of the bonds so shipped; the amounts thereof; and the numbers and amounts of the coupons thereto attached; together with satisfactory proof of the destruction by fire, or loss at sea, of any steamer upon which the same shall have been shipped; and, upon receipt of such certificate and proof of loss, will accept the bonds actually delivered under this contract, and will make the payments herein provided to be made, as though no such loss had occurred, and such lost bonds had actually been delivered: *provided*, that said committee shall indemnify the said parties of the first part against the production of said lost bonds at any time thereafter.

ARTICLE XX.

It is further agreed that should it be necessary to produce any of the bonds deposited under this agreement, in court, for the purpose of proof in any of the foreclosure suits now pending in Minnesota, as above stated, or for any other purpose connected with the said suits, said bonds may be removed from the place of deposit hereinafter mentioned, by said trustees, or either of them, for such purposes; and if said bonds should be required to be used in the purchase of the railroads and properties covered by the mortgages securing said respective series of bonds, or any of the same, or in completing any of the said foreclosures or the sales thereon, or for the purpose of carrying out this agreement in any manner, or of reorganizing said railroad companies, or of issuing the new bonds contemplated by this agreement, the said trustees are hereby authorized, jointly or severally, to make any use of said bonds that may be necessary for said purposes; and to buy in said railroads and properties at

any sale or sales thereof under the said foreclosures, or any of the same; and to use said bonds in making payments therefor; and shall thereupon take title to said railroads and properties in their own names or name, as such trustees, and hold the same until the delivery to them of the cash or the bonds and stock of said new company, as provided by this agreement; which delivery being duly made or secured to be made, said trustees or trustee so holding title, shall convey the said railroads and properties to the said newly-organized company.

ARTICLE XXI.

And it is further agreed that said trustees shall deposit said bonds and stock certificates, hereinbefore referred to, in the vaults of the Mercantile Safe Deposit Company of the city of New York, in their names as trustees jointly and severally; and there keep the same in iron safes, rented for that purpose, pending the full and final payment of the purchase price of said bonds and stocks, as stipulated in this agreement; except in so far as may be necessary to remove or use the same, or any part thereof, as above provided.

ARTICLE XXII.

It is also understood that either party to this contract shall have the right at any time, to verify the amounts of bonds so deposited, by counting and examining the same in the presence of either of the said trustees, under such rules and regulations as shall be made by said trustees for the safe-keeping thereof.

ARTICLE XXIII.

It is further agreed that in case of any failure on the part of said parties of the first part to pay the full amounts of

said semi-annual interest, at the times and in the manner aforesaid, and of the continuance of such default for thirty days thereafter, or in case of the failure of said parties of the first part to make the final payment of the purchase price of the said bonds and stocks, as hereinbefore stipulated, within six months after the sale under the decree last obtained in said foreclosure suits as hereinbefore provided, any and all sums of money which shall have been paid by said parties of the first part under this contract, including said sum of two hundred and eighty thousand dollars ($280,000) and all payments made on account of interest as herein provided, shall be forfeited to said parties of the second part; and thereupon said trustees shall immediately return and restore to said parties of the second part the ownership, possession, and control of the bonds and stocks deposited with said trustees under this agreement; and all rights which said parties of the first part may have acquired under this agreement shall absolutely cease and determine, and the bonds and stock deposited with said trustees under this agreement shall be held by them solely for the benefit of said party of the second part, and subject to their exclusive orders, disposition, and control.

ARTICLE XXIV.

It is further agreed that all expenses in the said foreclosures and other suits, incurred since the 22d day of December, 1877, and all expenses connected with the custody of said bonds and attending the making and full execution of this agreement and said trust, (including the proper remuneration of said trustees,) shall be borne by said parties of the first part.

ARTICLE XXV.

It is further agreed that while this agreement shall remain uncompleted in any respect, in case any vacancy shall occur

in the office of either of the trustees named in this agreement, or any successor in the trust hereby created, by death, resignation, or otherwise, the vacancy so arising shall be filled by the appointment of some suitable and competent person to be selected and appointed for that purpose by the surviving or remaining trustee.

ARTICLE XXVI.

It is further agreed that until a dividend of six (6) per cent shall have been paid upon the preferred stock, for any one year, the said parties of the second part, as such committee, shall have the right to nominate two (2) directors in the new company which may be hereafter organized by said parties of the first part, at the time of such organization after foreclosure of said trust deeds, and at each election for directors thereafter; such persons so nominated to be acceptable to said parties of the first part; at least two (2) months' notice shall be given of, and prior to, any election for directors; and thereupon the said Committee may name the persons selected by them to said parties of the first part; who, having accepted the said nomination, shall elect the parties so named, at the same time and place as other members of the board of directors.

ARTICLE XXVII.

And it is further agreed by the said parties of the first part that they will proceed to, and duly organize the said new company hereinbefore referred to, within six (6) months from the date of the sale under the decree last obtained in the said several foreclosure suits hereinbefore referred to; and so that the said bonds and stock herein provided to be used in making the payments under this agreement shall be duly executed and ready for delivery on or before the termination of said period of six months above specified.

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

As to George Stephen and Donald A. Smith. } R. B. Angus. GEO. STEPHEN. [Seal.]
Lenox Smith. DON. A. SMITH. [Seal.]

As to Norman W. Kittson and James J. Hill. } Lenox Smith. NORMAN W. KITTSON, [Seal.]
Edw. T. Nichols, Jr. By R. B. GALUSHA, his Atty. in fact.

JAMES J. HILL. [Seal.]
CHEMET & WEETJEN. [Seal.]
KERKHOVEN & Co. [Seal.]
LIPPMANN, ROSENTHAL & Co. [Seal.]
LEO LIPPMANN, GEO. ROSENTHAL.
WURFBAIN & SON. [Seal.]
TUTEIN NOLTHENIUS & DE HAAN. [Seal.]
H. C. VOORHOEVE & Co. [Seal.]
J. CARP. [Seal.]

WE, JOHN S. KENNEDY and JOHN S. BARNES, composing the firm of J. S. Kennedy & Co., of the City of New York, being the parties named as Trustees in the foregoing agreement, *Do hereby* jointly and severally accept the trusts therein created, and do acknowledge to have received from the said parties of the second part to said agreement, the Bonds mentioned in said agreement, to the amounts, of the numbers, and with the coupons thereto attached, particularly specified and stated in the Schedule hereto attached marked A. B. C. D. & E.

Also the stock of the Red River and Manitoba Railroad Company, mentioned in said agreement, (called the Breckenridge and Barnes Link) with the proxies thereto attached, as per memorandum hereto subjoined

To have and to hold the same upon the trusts, and with the powers in said agreement particularly set forth.

JOHN S. KENNEDY.
JOHN S. BARNES.

The word "*first*" in seventh line erased and the word "*second*" interlined before signing.

REPLICATION.

[*Filed June 23, 1887.*]

UNITED STATES OF AMERICA, DISTRICT OF MINNESOTA.

THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA.

IN CHANCERY.

JESSE P. FARLEY

vs.

NORMAN W. KITTSON, JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, *Defendants.*

The replication of Jesse P. Farley, the above-named complainant, to the joint and several answer of Norman W. Kittson, James J. Hill and the St. Paul, Minneapolis and Manitoba Railway Company, defendants.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendants, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be

replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed, or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

BEAM & COOKE, AND
HILER H. HORTON,
Solicitors for Complainant.

150 US 572

150 US 572

Office Supreme Court U. S.
FILED.
FEB 2 1892
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT

. . OF THE . .

UNITED STATES.

OCTOBER TERM. 1891.

JESSE P. FARLEY,

VS.

NORMAN W. KITTSON, JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

PETITIONERS' BRIEF AND ARGUMENT.

HENRY J. HORN,
C. D. O'BRIEN,
Counsel for Applicants.

BROWN, TREACY & CO., PRINTERS, 142 EAST THIRD, ST. PAUL.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1891.

2

JESSE P. FARLEY,

vs.

NORMAN W. KITTSON, JAMES J. HILL AND THE ST. PAUL MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

Petition of Norman Kittson and others, children, legatees and beneficiaries, under the last will and testament of their father, Norman W. Kittson, deceased, who was a defendant in the above entitled action—to be substituted, etc., in place of the St. Paul Trust Company, executor of said will. 3

BRIEF OF PETITIONERS.

STATEMENT.

The above entitled action is a suit in equity which was commenced by the above named plaintiff, Jesse P. Farley, a citizen of the State of Iowa, against the said Norman W. Kittson, father of the petitioners,

James J. Hill and the St. Paul, Minneapolis & Manitoba Railway Company, in the Circuit Court of the United States for the District of Minnesota, by filing his bill of complaint in 1880, being the same referred to in the decision of the Supreme Court of the United States, Farley vs. Kittson, 120 U. S. Rep., p. 303.

Upon the said case being remitted to the Circuit Court of the United States, and while it was pending there, the said Norman W. Kittson, father of said petitioners, died in 1888, and by stipulation of parties the St. Paul Trust Company named and appointed *as his executor*, after proof of the will the same year was substituted as a defendant in said action in place of said Norman W. Kittson, deceased in 1888. The nature of the suit was in brief a claim made by the plaintiff upon an alleged agreement between himself, the said Norman W. Kittson and James J. Hill, in 1876, whereby the said Farley, plaintiff, was to have a share in the railroad properties which were expected to be acquired by the said Hill and Kittson upon a sale under decree of foreclosure of certain trust deeds, executed by the railroad companies involved. The amount claimed by the plaintiff was very large, being several millions of dollars, involving also the St. Paul, Minneapolis & Manitoba Railway Company, defendant, which was a re-organization of the foreclosed companies. The cause proceeded to a final hearing before the said Circuit Court upon the pleadings and proofs before the Hon. Judge Brewer, and a decree was made and entered by said Circuit Court in favor of the defendants dismissing the bill of complaint of the plaintiff on the 27th day of September, 1889. An appeal was thereupon taken by the plaintiff Farley to the Supreme Court of the United States, which is the

action now pending in said Supreme Court above en- 7
titled. The bond upon said appeal was $2,000 and was not a *supersedeas* or stay bond.

Upon the death of Norman W. Kittson, the testator, his will was proved and allowed by the Probate Court of Ramsey County, in the State of Minnesota, in 1888, and letters testamentary issued by that court to the St. Paul Trust Company, the executor named in his said will; and administration of his estate commenced in said Probate Court. By the said will, the St. Paul Trust Company is appointed executor aforesaid, and also trustee with respect to certain of his children and in 8
certain matters specified in said will, and also testamentary guardian of his minor children and of three grand-children of the said testator, being children of a deceased son, Alexander Kittson. (See printed copy of will attached to petition, sec. 2, page 9.)

The said testator left eleven children, who are described and named in the fourth section of his said will, (Id. page 10). By inspecting the will, and in fact, these children either directly or as beneficiaries under certain trusts are entitled to the bulk, or the principal part of the estate of said deceased,—which gives to them, after 9
certain specific devises or legacies, each an eleventh part of the residuum or undivided estate of said testator.

In the following instances such share is given directly to certain of the children specified, viz.:

To Norman Kittson, sec. 13, page 13.

To Henry Kittson, sec. 14, page 14.

To Louis Kittson, sec. 15, page 15.

To James E. Kittson, sec. 16, page 15.

To the St. Paul Trust Co., in trust for Hercules L. Kittson, being the share of the last named child, sec. 17, page 15.

10 To the St. Paul Trust Co., in trust for Louis Coyle Kittson, being the share of said last named child, sec. 18, page 17.

To the St. Paul Trust Co., in trust for Alfred Kittson, being the share of said last mentioned child, sec. 19, page 20.

To the St. Paul Trust Co., in trust for the four daughters of said testator,—Anna Mary Kittson, Mary Elizabeth Kittson, Louisa Lorette Kittson and Mary Esther Kittson.—being the share of said daughters,—secs. 20, 21 and 22, pages 23 and 24.

11 To the St. Paul Trust Co., in trust for the three grandchildren, the children of Alexander Kittson, a deceased son, $10,000 each, or in all $30,000,—sec. 10, page 11.

In case of any residuum of his estate not provided for in the will, the same was to be added to the shares of his said children pro rata, sec. 30, page 30.

A power of sale was also invested in the St. Paul Trust Co. both as trustee and executor and in either capacity, to convert property, etc., sec. 27, page 28.

In Minnesota the special trusts set forth in said will would be held by the trustee, the St. Paul Trust Co. in a
12 distinct capacity from its executorship.

Simpson vs. Cook, 24 Minn., p. 180.

The administration of the estate proceeded until the executor was ready to make distribution, having paid and discharged all the claims and debts of the decedent (with the exception of said claim of Farley), and the expenses of administration and smaller pecuniary legacies; and as the said Farley had made no claim against the estate of the testator to the Probate Court, and nothing remained with the exception of the Farley claim but to

make distribution, the said St. Paul Trust Co. as executor made an application to the said Probate Court for leave to close up and settle the estate by its final decree of distribution to the children or their trustee and other beneficiaries under the will who were entitled to participate in the distribution. And the said Farley, Hill and the St. Paul, Minneapolis & Manitoba Railway Co. were cited to appear and show cause why the said petition of the executor should not be granted. At the hearing before the Probate Court upon said petition, the plaintiff Farley did not appear nor make any opposition to the same. The said Hill and the said Railway Co., however, objected and the petition was denied by the Probate Court, and upon an appeal the matter was reviewed by the District Court and thence upon an appeal, by the Supreme Court of the State of Minnesota. (In re Kittson's Estate, 45 Minn., page 197). In which the decision of the Probate Court was practically affirmed. But neither in the Probate Court, District Court or Supreme Court did said Farley, the plaintiff, make any objection to the prayer of the petition. 13 14

The Statutes of Minnesota, or what are called sometimes the Probate Law of that State, provides, practically, for the speedy settlement of estates, so as to make distribution among the beneficiaries of a testator or the heirs of an intestate at an early period. Creditors in general are required, on notice, to present their claims to be audited by the Probate Court within the time fixed by that court in practice six months in the first instance, with discretion to enlarge that time to a period not exceeding two years. 15

Gen. Stats. of Minn., (compilation of 1878, known as "Gen. Stats. 1878") chap. 53, secs. 6, 7 and 8; and sec.

20, etc.; Probate Code of 1889, Gen. Laws of Minn. of the year 1889, chap. 46, sub-chap. 6, sec. 102, page 115—claims not presented within the appointed time are barred. In actions, however, which are pending at the time of the death of the decedent there is the following provision, "That all actions which are pending against a deceased person at the time of his death *may*, if the cause of action survives, be prosecuted to final judgment and the executor or administrator *may* be admitted to defend the same; and if judgment is rendered against the executor or administrator the court rendering it shall certify the same to the Probate Court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate." "Gen. Stats. 1878," chap. 53, sec. 16; Probate Code of 1889, chap. 46, sub-chap. 6, sec. 111, page 117. The Supreme Court of Minnesota has decided that this provision refers to actions pending within the State of Minnesota. *In re* Kittson's Estate, 45 Minn., page 197.

The said Probate Court is also required by law, at the time of granting letters testamentary or of administration, to limit the time of the executor or administrator to settle the estate to one year and six months in the first instance,—which may be enlarged for special cause shown to three years, unless under the provisions of the will a longer time be necessary.

"Gen. Stats. 1878," chap. 53, secs. 33 to 36; Probate Code of 1889, chap. 46, sub-chap. 7, secs. 116 to 117.

The Statutes of Minnesota also provide for suits against heirs, devisees or legatees by creditors whose claims have not been barred to subject assets in the

hands of such parties to the payment of such creditors' 19
clajms within one year after such claim has been established.

"Gen. Stats. 1878," chap. 77, secs. 7 to 12; and secs. 13 to 14.

McKeen vs. Waldron, 25 Minn., 466.

Borer vs. Chapman, 119 U. S. Reps., page 587.

The plaintiff Farley, has never made any claim to the Probate Court, nor sought to establish a claim as a creditor by proceeding in that court, and has never objected to the attempt of the executor, through the 20
petition of the latter before notice to close up the estate in the Probate Court and make distribution, as he sought to do by leave of that court—Mr. Farley not having appeared or opposed the petition either in the Probate Court or in the appeal to the District Court, or in the appeal to the Supreme Court; the only parties in the suit who have objected being the defendant James J. Hill and the St. Paul, Minneapolis & Manitoba Railway Company.

The estate of said testator amounts to several millions of dollars. 21

ARGUMENT AND AUTHORITIES.

It is needless to say that the pendency of the above entitled action, if an objection to the settlement of the estate of the decedent which amounts in value to several millions of dollars, will delay the closing up and distribution of the estate far beyond the period contemplated by the statutes of this state for the settlement of decedents' estates, and will result in great hardship to the

distributees and beneficiaries of the estate who are waiting for its distribution. The difficulty in the state courts seems to be the fact that the executor is made a party to this litigation under the Statutes of Minnesota, and that as long as he is a party, the settlement of the estate must be necessarily kept open until the litigation is finally determined and ended. And it is also clear that if the parties petitioners and the trustee, as such trustee, and not as executor, are made parties defendant in place of the executor, that this difficulty will be obviated, and the estate will then be distributed as the executor desired that it should be in his petition and be subject in the hands of the distributees, to the claim of the plaintiff Farley in the present action. That is to say, that the plaintiff will be in the same position as if the Probate Court had thought proper to deliver over to the distributees the property to which they ure entitled under the will, or if they had in some other way become possessed of the same. Whatever difficulty there might be, if any, under the statutes of the State of Minnesota, to accomplish this result by substitution of the distributees or beneficiaries of the estate of the testator in place of the executor, there appears to be none with respect to such action; and the attitude of the plaintiff therein in the federal courts. A citizen of another state than that in which the administration of a decedent's estate is being administered is not required to establish his claim against such an estate by proceedings in the Probate Court. He is privileged to establish his claim in the Circuit Court of the United States. The federal courts have also the power in equity to call to account the heirs or distributees of an estate having assets in

their hands which may be subjected to the payment of the claim of the creditor. 25

Payne vs. Hook, 7 Wallace, 425.

Borer vs. Chapman, 119 U. S. Reps., page 587.

In the latter case the Supreme Court of the United States made a substitution of Mr. Borer as administrator with the will annexed, in place of a deceased executor. The plaintiff in this case proceeding in a court of equity must so conduct his litigation as not to prejudice the equities of other parties. And it would seem unreasonable that, when in the substitution of parties such as is 26
asked in this case the parties substituted would be deemed trustees to the amount of assets in their hands for the benefit of the plaintiff as far as his claim is concerned, that their rights and remedies should be so long delayed when the plaintiff could be reasonably protected by the desired substitution in the federal court.

The federal courts acting independently of the state courts with respect to the subject matter in controversy, have, it seems to us, undoubtedly the power and discretion to make the substitution desired, and by so doing will reasonably protect the plaintiff and prevent great 27
injustice and hardship to the petitioners.

HENRY J. HORN,
C. D. O'BRIEN,
Counsel for Applicants.

150 U.S. 572

150 U.S. 372

In the Supreme Court

OF THE UNITED STATES.

Office Supreme Court U. S.
FILED.
FEB 22 1892
JAMES H. McKENNEY,
CLERK.

JESSE P. FARLEY,
Appellant,

against

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, as Executor, &c., et al.,
Appellees.

BRIEF FOR EXECUTOR.

Copy

HARVEY OFFICER,
Attorney for Executor.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

JESSE P. FARLEY,
Appellant,

vs.

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, (as Executor of the Last Will and Testament of Norman W. Kittson, Deceased,) and THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,
Appellees.

BRIEF ON BEHALF OF DEFENDANT,
The St. Paul Trust Company, as Executor, etc.

To the Honorable, the Judges of the Supreme Court of the United States.

This substitution is prayed for, to the end that the estate of said testator may be settled and distributed in the Minnesota court; and, if the prayer of the petitioners be granted, it will no doubt be followed

by their petition in the Probate Court of the State, for such settlement and distribution.

The petition fails to fully plead and state the facts as they exist, the laws of the State affecting the facts, and the adjudication of the Supreme Court of Minnesota; it is also indefinite in regard to values, and other particulars; but the answer of this defendant supplies what is wanting in the petition.

The executor is now, and has been at all times since January 18, 1890, ready and willing to render its final account, and distribute the estate according to the will of the testator, and according to the laws of the State, whenever it can do so, relieved of any possible liability to the plaintiff, or to its co-defendants; but it respectfully contends that the substitution asked for, if granted, would not relieve it from such liability to either; on the contrary, it would increase its liability, by depriving it of power or authority to continue in its employment counsel of its own selection, in the future management of the litigation in this court, as well as in the court below, in the event of a reversal of the judgment of the Circuit Court dismissing the bill; for, in the event of such reversal, the case must necessarily be remanded to that court for a long accounting, etc.

The executor therefore respectfully opposes the substitution.

First: Because, having been duly substituted in the court below, it has the absolute right to remain a party to the action, so long as it is lawfully in the exercise of the trust of executor of the will of the testator, under the commission and letters testamentary to it issued by the Probate Court of the State.

Second: Because, if the substitution could be granted, such substitution could not operate to enable it, either upon its own motion, or upon the petition of the devisees and legatees, to settle and distribute the estate, pending this suit; for the reason that the Supreme Court of the State has decided to the contrary, and forbids such a distribution.

The record presents no question as to whether the cause of action survived, or as to the regularity or propriety of the substitution in the Circuit Court.

"The revivor of a suit in equity, by or against the "representative of a deceased party, is a matter of "right, and a mere continuation of the original "suit."

Fitzgerald vs. Domingo, 14 Fed. Rep. 216; following *Clark vs. Mathewson, 12 Peters, 164,* and other cases cited.

Thomas vs. Police Jury of Parish of Tensas, 14 Fed. Rep. 390.

Judiciary Act of 1789, ch. 20, sec. 31; Equity Rule 56.

Barribeau vs. Brant, 17 How. 43.

Green vs. Watkins, 6 Wheaton, 260.

Mackie's Heirs vs. Thomas, 7 Wheaton, 314.

McNutt vs. Bland, 2 How. 9-15.

The proposition that the federal courts have the power in equity to call to account the heirs or distributees of an estate having assets in their hands, *which they have received from the estate of their deceased,* and to subject such assets to the payment of claims of creditors, is not disputed.

But that is not the object or purpose of this suit, nor of this motion. It does not appear that any part of this estate has been distributed, nor is the plaintiff seeking to subject any such assets in their hands. It is enough for him to know that this executor, as the representative of the entire estate, has been made a party defendant, and that the courts of the State have adjudged that under the State laws the executor cannot distribute the estate, pending this suit, except at its own peril, and in direct violation of such adjudication.

He will no doubt pursue the same policy in this court as he did in the State courts, and interpose no objection to this motion. So long as the State court holds entire estate in the hands of the executor, subject to his claim, it is of little moment to him whether this substitution is made or not. If made, it would simply give him other defendants against whom he might enforce his judgment, (when obtained,) *de bonis propriis*, rather than *de bonis testatoris*.

The cases cited by the learned counsel for the petitioners, from *7 Wallace, 425*, and *119 U. S. 587*, do not sustain the proposition contended for. If this executor should resign its trust, or should be removed therefrom, pending this suit, it would then, no doubt, be a proper proceeding to substitute its successor as defendant in this court, upon the authority of the cases above cited. But I find no case where this court has asserted the right to dismiss a pending suit as against an executor or administrator who has been duly substituted, as the personal representative of a deceased party, and while rightfully exercising his trust, and in the lawful possession of

the entire estate under the laws of the State from which he derives his authority, in favor of any heir-at-law, devisee or legatee, who is not yet entitled to possession of his share of such estate, under such laws.

The substitution asked for, if granted, would at once deprive the personal representative of the estate of any right to be represented in this court, on the argument and hearing of this suit, on the pending appeal, or upon any future proceedings in the court below, if the case should be remanded to that court for further proceedings, by counsel of its own selection or employment, or otherwise.

If the substituted defendants should not appear, the executor would be powerless to defend the estate; and yet the State court has adjudged that it holds the whole estate, subject to the contingencies of this suit. Under such circumstances, it can do no less than to maintain and defend its *right* to remain a defendant here, and to respectfully oppose the dismissal asked for.

But what will be the result, if the substitution shall be granted?

The effort made by the executor, in the State courts, to obtain an order directing the distribution of the estate, upon its petition of January 18, 1890, notwithstanding the pending Farley suit, involved the construction of the statutes of the State of Minnesota, in relation to the distribution of estates, under the facts and circumstances of this case, that is to say, a construction of *section 16*, of *chapter 53*, and of *section 4*, of *chapter 56*, pleaded in this defendant's answer on this motion.

In its construction of these statutes, by the Supreme Court of Minnesota, (*45 Minn. p. 202,*) the court say:

"The result of this proceeding is to be regretted, as "it will probably do an injustice to the devisees and "legatees; but the responsibility for the defect in the "statute—*which wholly fails to guard against the "present situation,* and has thus given an oppor- "tunity for a *postponement of the settlement of "estates for an indefinite period*—is with the law- "makers, not with the courts."

In other words, the result of this decision is, to give this plaintiff, in effect, an absolute lien upon the entire assets of the estate, pending this suit; and it affirms the orders of the Probate Court and District Courts, which refused the petition of the executor for leave to distribute the estate, notwithstanding this suit.

This adjudication is not here for review; and it being an adjudication upon the construction of a State statute, which does not involve any federal question, it could not be made the subject-matter of review by this court.

Whatever may have been the views and opinions of counsel for the executor, before that interpretation and construction was given, loyalty to the Supreme Court of the State forbids the possibility of his now expressing any other opinion but that such is the supreme law of the State, so long as such adjudication remains the adjudication of that court.

It may not be inappropriate however to state, that in my brief and argument in the Supreme Court of the State, I claimed—as to the construction given by the

court below (District Court)—"that the order which "*suspends* the estate in the hands of the executor, "and prevents the payment of legacies and distribu- "tive shares, pending the litigation, *gives Farley and* "*the respondents a lien on the whole estate*, which, "the executor claims, is not contemplated by the "statute." (*See page 15, of brief annexed.*)

I annex the brief hereto, not for the purpose of questioning the wisdom or propriety of the adjudication of the Supreme Court, but to show that the *results* of the order of the District Court, then under review, were pointed out to the Supreme Court; and that the Supreme Court intended to adjudicate, and did adjudicate, in effect, that upon the admitted facts, Farley had and has a *lien* upon the whole estate in the hands of the executor, which it cannot distribute, except at its peril, and in direct violation of the adjudication of the court of last resort in the State.

In this connection I call attention to the fact, that the answer states the exact appraised value of the estate, and that Farley's claim is for more than double the value of the estate. What would be the result if the executor should distribute the estate contrary to the orders of the State courts, and Farley should thereafter succeed in establishing his claim, as he states it in his bill of complaint?

The learned counsel for petitioners, in his brief, at *page 6, fol. 17*, after quoting *section 16, of chapter 53*, states: "The Supreme Court of Minnesota has "decided that this provision refers to actions pending "within the State of Minnesota." *Citing 45 Minn. 197.*

A single glance at that case will show this court that the said Supreme Court decided in that case, that—

"Actions pending against a citizen of this State at "the time of his death, the cause of action surviving, "in the federal courts sitting within our territorial "limits, and judgments rendered therein against an "executor or administrator who has been admitted "to defend, are included within the provision of said "*section 16.*" *See syllabus; and opinion, at foot of page 199.*

As to the position of the executor, in the Supreme Court, on this point, see annexed brief, *pages 15-23.*

I respectfully submit, therefore, that if this motion should be granted, the estate of the deceased testator must remain in the possession of this executor, and cannot be distributed, or otherwise settled, pending this suit, unless in the meantime the Supreme Court of the State shall take occasion to reverse or modify its said adjudication.

And as that adjudication is not here for review, it is not for me to question it.

I will notice one other *suggestion* contained in the brief of counsel, at *page 8, folio 22,* from which I quote:

"And it is also clear that if the parties petitioners, "and the *trustee,* as *such trustee,* and not as executor, "are made parties defendant, etc., etc."

The moving papers do not ask that any person except the petitioners, that is to say, the devisees and legatees, the children of said deceased—be substituted as defendants.

It is only necessary to say, that by the terms of the will, none of the express trusts, of which the St. Paul Trust Company is named as the trustee thereof, have vested, or can vest, until the settlement and distribution of the estate; and there is therefore no trustee in existence who could be substituted, even if named in the moving papers. And if a substitution should be ordered, and the executor dismissed from the case, more than one-half of the entire estate would *not be represented* in this court, or in the future litigation thereof, if any, in the court below.

Respectfully submitted,

HARVEY OFFICER,
Atty. for Defendant, The St. Paul Trust Company.
As Executor, &c.

STATE OF MINNESOTA,

Supreme Court.

THE ST. PAUL TRUST COMPANY,
as Executor, etc.,
Appellant,

against

JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,
Respondents.

ASSIGNMENT OF ERRORS
— AND —
BRIEF FOR APPELLANT.

HARVEY OFFICER,
Attorney for Appellant.

H. H. SMYTH PRINTING COMPANY, ST. PAUL.

STATE OF MINNESOTA,

SUPREME COURT.

THE ST. PAUL TRUST COMPANY, as Executor, &c., of Will of NORMAN W. KITTSON, Deceased,

Appellant,

against

JAMES J. HILL, AND THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,

Respondents.

APPELLANT'S ASSIGNMENT OF ERRORS.

First. The District Court, in its memorandum attached to the order appealed from, expresses a doubt whether Mr. Hill and the railway company have any standing in court to object to the relief asked by the executor.

Had Mr. Farley appeared and answered, admitting the facts pleaded, but claiming the order which the court made, there is no doubt he would have had a standing in court, for the purpose of opposing the

application; and if he could have had such a standing, then any of the other parties to that litigation have a right to appear and oppose it, for the reason suggested in the executor's petition; that is to say, that if the result of the litigation should result in a judgment against Hill, or the railway company, then either might claim contribution against the executor in case of payment, under the statute.

Whether they could do so, without having filed a claim against the estate, either direct or contingent, in the Probate Court, necessarily involves the *merits* of the question, which was decided by the order appealed from.

But whether either Farley, Hill, or the railway company, had or could have a standing in court, it is not necessary to decide.

The executor had a standing in court, wholly irrespective of any of those parties. An executor or administrator has the right to the instruction and direction of the court which has jurisdiction of the estate of which it is the trustee, upon any question of doubt arising upon the construction of the statutes of the State, affecting the due and proper administration of the estate, to protect itself against either the responsibility of a premature payment of legacies and distributive shares, or, the penalty of a refusal to pay such legacies and distribute the estate, when legatees or heirs at law claim that it is ripe for such payment and distribution. And all persons in any manner interested in the estate, having been called into court by the order to show cause, the executor has a right to the protection of the order, whether such persons choose to appear or not, and wholly independent of their action in the premises.

Second. The District Court erred in its said *memorandum*, in finding that "it does not appear in this "case that the debts are paid. On the contrary, it does "appear that the amount of the indebtedness is yet "undetermined." (*See folio 32, p. 11.*) Also, in finding that "the petition does not show that the estate is "in condition for distribution." (*See folio 34, p. 12.*) These findings are in direct conflict with the facts alleged in folios 4 and 12, to-wit, that "*no reason* now "exists why the said will should not be executed and "the final accounting had, and the division and distri-"bution of the said estate ordered and made, save "and except the pending of said (Farley) litigation." This last allegation necessarily involves the fact that the time limited by the Probate Court for filing claims has expired, and that all unpaid claims against the estate have been duly barred, and stands admitted by the demurrer. The allegation last quoted can only be met by an answer: either that no time was fixed, or that such time if fixed, had not expired, or, that the Farley claim was filed in this court within such time.

Third. The court erred in holding, (*in folio 33, p. 11,*) that the statute "places claims established in "actions against a party pending at the time of his "death, which are prosecuted to final judgment, the "executor being made a party, upon the same footing "as claims proven in the Probate Court."

Fourth. The Probate Court has no authority to extend the time originally limited for the payment of debts and legacies, so that the whole time allowed to the *original* executor shall exceed three years, unless *under the provisions of the will*, a larger time may be necessary. (*Stat. of Minn. p. 589, Sec. 34.*) It does not appear that the executor has made any application

to extend the time originally limited; and the court below erred in holding, (*see folio 32, 33,*) that pending litigation would control the above cited provision.

Fifth. Mr. Farley, the plaintiff, and Mr. Hill and the railway company, co-defendants with the executor in the litigation referred to, had their remedy provided by the statute relating to *contingent claims* against the estates of decedents, (*Stat. p. 590–91, Sec. 46 to 51,*) and having failed to avail themselves thereof, Farley is limited to what assets he may find in the hands of the executor, when he shall have filed his certified copy of any judgment he may obtain in the Probate Court; and Hill and the railway company are limited to such assets as they may find in the hands of the executor, when they shall have paid such judgment, and make their claim for contribution. (*Stat. p. 587, Sec. 16*)

The statute gives them no lien upon the assets, after the expiration of the time limited for filing claims, from the mere fact of the substitution of the executor as a defendant in litigation pending at date of death of the testator.

BRIEF FOR APPELLANT.

Before the petition of the executor was filed in this case, the general laws of the State had been changed by the Probate Code of 1889, which took effect Oct. 1, 1889. *Chap. 46, Genl. Laws of 1889, p. 160*

But *Sec. 323, on page 158*, of that act, provides that "no action or proceeding commenced before the code "takes effect, and no right accrued, is affected by its "provisions, but the proceeding thereon must con- "form," etc.

The "Farley suit" was pending, and the executor had been substituted as a defendant therein, prior to Oct. 1, 1889, and the rights (if any) of Farley and the respondents, had therefore accrued prior to that date, and therefore the construction of the then existing statutes must be given to the case.

First. In the *memorandum* attached to the order appealed from, the court below, before deciding the demurrer to the petition on the merits, takes occasion to criticise its sufficiency; and although these criticisms were not made by counsel for respondents, in that court,—and may not be urged here, as all parties desire a determination upon the merits, that is, the construction and effect of *Sec. 16, Chap. 53, of Genl. Statutes*, as it affects the administration of an estate,—I shall very briefly refer to these criticisms.

The learned judge expresses a doubt whether the respondents, Hill and the railway company, have any standing in court to oppose the distribution of the estate, when the plaintiff, Farley, has made no appearance, or answer, to the order to show cause, and is in default. But it is suggested in the petition, that in the event that Farley succeeds in obtaining a judg-

ment on his claim, in the Circuit Court, the other defendants, Hill and the railway company, will have a right to claim contribution from the Kittson estate, in the event that they or either of them shall pay the judgment. And it is on this ground that they appear and oppose the motion. If Farley's claim is such that he could have filed it in the Probate Court, as a claim against the estate, whether direct or contingent, then Hill and the railway company might have also filed in that court a contingent claim, based upon their liability to pay the judgment, and their right to a contribution, when so paid by them. And if the pending suit operates to stay all assets in the hands of the executor, under the statute referred to, failure to appear does not affect his rights under the statute; and the respondents have the same right to appear and oppose the order, as he would have had, if he had appeared and interposed the same demurrer. And they having appeared and opposed the application, and obtained the entry of an order which prevents the payment of the legacies under the will, and the distribution of the estate, the order is appealable under *Subd. 4, of Sec. 13, Chap. 49, p. 575, of Genl. Statutes.*

But the executor claims that the facts stated in the petition gave it a standing in court, wholly irrespective of either Farley or the respondents; and that if they had all defaulted, it had the right to ask the instruction and direction of the court, upon the construction of the statute referred to; and if such construction was adverse to its appearance and motion, as it was, it had the right to appeal therefrom. *Sec. 14, Ib.*

It is wholly unnecessary to cite this court to its decisions to the effect that the Probate Courts of this State have all the powers which any court has, as

respects the subjects committed to them, in the exercise of an original jurisdiction; and in such cases they are placed on a level with the District and Supreme Courts. They are "domestic courts of superior jurisdiction." *Davis vs. Hudson, 29 Minn. 27. Brook et al. vs. Chappel, 34 Wis. 405.* And in that court, as in any other court of equity, it is the right, as well as the duty, of a trustee, to apply to the court for its advice and direction, in any matter of which the court has jurisdiction, upon the construction of any *doubtful statute* affecting the proper administration of the particular trust. He has the right to the protection of the court, as well against the demands and threats of persons claiming a lien on the whole estate, as against the importunities of legatees or heirs at law; and to be protected against the results of a premature distribution, and the penalties of a delay in making the same. The petition in this case asks for such decree and relief as the facts may justify; and if the order granted is not such as he moves for, he has his right to appeal.

3 Williams on Exrs., 6 Am. Ed., p. 2022, and authorities cited in note t[3], on page 2023; also citing 22 and 23 Vict. Chap. 35, Sec. 30.

Schuler on Exrs. and Admrs., Sec. 265; citing above, and other authorities.

Second. The petition, at *page 2, fol. 4*, states that the executor "has paid all the expenses and charges "of the last sickness and funeral expenses of said de-"ceased, and the charges and expenses of the adminis-"tration of said estate under said will, so far as appears "in said account," i. e., the account filed with the petition. "And has also paid and satisfied all just

"claims and demands against said estate, which have "been examined and allowed by this court, as claims "against said estate;" and (*in folio 12, page 4*) that "*no reason now exists* why the said will should not be "executed, and the final accounting had, and the "division and distribution of the said estate ordered "and made, save and except the pendency of the said "litigation upon said appeal, and the liability (if any) "of your petitioner to be compelled to respond to any "such possible judgment," etc.

These were allegations of probative facts, which were susceptible of proof from the records and files of the Probate Court, in which the petition and account were filed, in the matter of the said estate, and of the existence or non-existence of which the Probate Court had knowledge.

The facts disclosed by those records were as follows:

The will of N. W. Kittson, deceased, was duly proved and admitted to probate in said court, and letters testamentary thereon issued to the petitioner, on June 25, 1888. On Aug. 7, 1888, an order was entered by the court fixing the time and place for creditors to file their claims, and six months from that date was the limit for filing the same. Due proofs of the publication and posting of this order had been duly filed.

An order was also entered Aug. 7, 1888, allowing the executor one year from that date to pay debts, etc., and this time had been extended six months from Aug. 7, 1888, on the petition of the executor, and that six months expired Feb. 7, 1889, to-wit, nearly one year before the petition herein involved was filed; and no other extension of said time to pay debts had been applied for or granted.

Within the time fixed by the orders of the court, for the examination and allowance of claims, debts had been duly proved and allowed to the amount of $89,000; and the *account* which the exeeutor filed with the petition herein, showed that it had paid all these claims in full, *between the date* of the filing the opinion and decision of Judge Brewer, in the U. S. Circuit Court, dismissing the Farley bill, and the date of, and prior to, the appeal to the Supreme Court of the United States, from the judgment entered on that decision.

The inventory on file in the Probate Court, in the matter of said estate, in connection with said accounting, showed *personal* assets then remaining in the hands of the executor, of the apprai-ed value of over $1,500,000, and real estate of about the same valuation; and the said records and files then disclosed no reason whatever why the legatees under the will should not forthwith receive their legacies and bequests, and the executor then make its final accounting.

If there had been no time fixed by the Probate Court for the allowance of claims, or, if no notice thereof had been given, or, if given, it had not expired, or, if there were any just claims against the estate which had been allowed as such and not paid, or, if the Farley claim had been presented as a contingent claim, and an order had been entered staying assets in the hands of the executor until it had been adjudicated, or, if either of the respondents, Hill, or the railway company, had filed a contingent claim, based upon the possible recovery of a judgment, and their right to contribution in case of payment thereof, any or either of these facts would have been an answer

to the allegation that the estate was ripe for a final accounting and settlement. And yet, notwithstanding the admission of these facts by the demurrer, the District Court finds in the "*memorandum*," that "it does not appear in this case that the debts are paid;" that "it does not appear that the amount of the indebtedness is yet undetermined."

There is nothing in the petition that can justify these findings. It is not in the *power* of an executor or administrator to establish a claim as a debt against an estate, by a mere admission of its existence; he cannot *make* it a debt of the estate, even by its *payment*, until after it has been either adjudicated as such, by having been filed and proved as such; *Bunnell vs. Post, 25 Minn 376;* or, (in the case provided for in *Sec. 16, Chap. 53,*) until a *judgment* has been certified from the court rendering it, to the Probate Court.

The petition does not pretend to admit the validity of the Farley claim; on the contrary, the allegation is, (*fols. 7–8,*) *that the* plaintiffs' bill of complaint was *dismissed* by the U. S. Circuit Court, on Sept. 27, 1889, and a judgment duly entered therein, dismissing the said bill, with costs; and that the litigation was now only alive by reason of the appeal from such judgment to the Supreme Court of the United States. It was absolutely out of the power of the Probate Court, at the date of filing this petition, to take notice of, or consider, that litigation, as a claim or debt against the estate, upon the admitted facts, until a judgment therein shall have been rendered against the estate and certified, as the statute requires.

The Probate Court may as well, upon the final settlement of an estate, suspend all proceedings and

refuse to grant distribution, because some person has made a verbal statement to the court that some other person has a claim against the estate which he has neglected to file, and which the records show has been duly barred.

I respectfully submit, therefore, that the facts alleged in this petition were sufficient to entitle the executor to a construction and interpretation of *Sec. 16*, on the merits; that is to say, whether, upon the facts, the estate being otherwise ripe for settlement, except the payment of legacies and a final accounting, the said section operates as an absolute bar to such payment and distribution so long as the litigation shall be pending. The court below has passed upon the merits of the question, and has so construed the statute. And the same question is here for review.

It would be a great hardship to the devisees and legatees if this court should, for any of the foregoing reasons, fail to decide the cause on the merits. It is not often that an executor with millions of property in its possession, would contest an order which necessarily operates to stay that property in its hands for an indefinite number of years. But this executor is ready and anxious to discharge its trust and settle this estate at the earliest date practicable, after this court shall have decided it can do so with safety, by the reversal of the order appealed from.

Third. The court below is correct in holding that the provisions of the statute, (*Secs. 33, 34 and 35 of Chap. 53, p. 589,*) requiring the Probate Court to fix a period not longer than three years for the payment of debts and legacies must be considered in connection

with the other provisions of law for the establishment of claims and for varions other proceedings. (*See fol. 33.*)

But I respectfully urge that what follows in *folios 33 and 34*, and the construction of the above sections there given by the court, is error.

There are three distinct classes of claims against the estate of a decedent, for which different *remedies* are provided by our statute.

The first class, are allowances to the widow and children (if any), the expenses of last illness, funeral expenses, expenses of administration, debts having preference by the laws of the United States, public rates and taxes, judgments entered and perfected prior to the death of the deceased, and debts due to other creditors, duly proved and adjudicated as such by the Probate Court.

All claims in this class must be paid in full, if the estate is solvent; or if insolvent, then in the *order* of preference prescribed by *Sec. 38, Chap. 53.*

A *second class* are contingent claims, which cannot be proved, but which *may be presented* to the court, and the court may order the executor to retain in his hands sufficient to pay such contingent claim when the same becomes absolute. (*Sec. 46, p. 590.*)

And if such contingent claim (that is, one which has been *so presented* to the court) becomes absolute within two years from the time limited for other creditors, it may then be proved, in the same manner as if presented before; (*Sec. 47*); and when it is allowed, as mentioned in Sec. 47, the creditor is entitled to receive payment to the same extent as other creditors, if the estate retained by the executor is sufficient for that purpose, etc. (*Sec. 48.*)

A *third class* are claims accruing or becoming absolute *after* the time limited for creditors to present claims. Such claimant may present it, and prove it, at *any time* within one year after it accrues or becomes absolute; and if established, the executor shall pay it, if he has sufficient assets for that purpose, or, such part as he has assets to pay (*Sec. 49*); and if he has not sufficient assets, the claimant may recover of the heirs, etc. (*Sec. 50.*)

To each of these three classes a different remedy is provided.

The *first class* operate as absolute liens upon the assets of the estate, real and personal; as there can be no payment of legacies, or final distribution of the estate, until they are paid in full, (*Chap. 596, Secs. 1 and 4,*) or, in their order of preference, if the estate is insolvent.

The *second class*, if they have *presented* their claims, and have obtained an order that the executor retain sufficient in his hands to pay the same, shall be paid out of that fund when the claims become absolute. But the devisees and legatees would be entitled to a distribution of all the balance of the property, (the estate being otherwise ripe therefor,) subject to a further accounting as to the fund retained under such order.

The *third class* are those who have presented no claim during the period first fixed by the court, but come in within one year after their claims accrue, and present and prove them. They are *limited* in their remedy to such assets as they find in the hands of the executor, with a right to follow the heirs for the balance. But until such a claim is presented and

proved, the estate may proceed to final distribution; and if already distributed, they have their remedy from the heirs at law, devisees or legatees.

And, (under *Sec. 51, Chap. 53*) as against *any* contingent claimant, who has not *presented* his contingent claim, and either obtained the order to retain, under *Sec. 46*, or, who failing to present it, has not come in after one year from date when it accrues, the executor may successfully plead *plene administravit*, and so limit the claimant to his remedy against the heirs and devisees.

To which of the three classes does this Farley claim (and the claim of respondents) belong?

It is evident that it does not belong to the first class, that is, a claim adjudicated by the Probate Court; because, if it was, the executors' claim that it has paid all such claims, would not be true.

It is also evident that it does not belong to the second class; because it has not been presented to the Probate Court as a *contingent* claim (*see fol. 10*) by either Farley or respondents; and it is also evident that there was no intention to file it, and procure an order staying assets in the hands of the executor to pay it, as the petition states that Farley claims that in the event he shall recover a judgment, *at any time hereafter*, and the court shall certify it to this court, the amount shall be paid as other claims allowed against the estate.

It follows, therefore, that it is a claim under *Sec. 16, of Chap. 53*, which Farley may present at any time within one year after it accrues, that is, after the date of his judgment, or, which respondents, Hill or the railway company, may present at any time within said

one year, if they or either of them pay that judgment *under Secs. 46 and 49*. And this they cannot do for "several years," during which the case will be in litigation. *See fol. 12.*

And when Farley, or the respondents, will so file such a claim, after the several years' litigation shall result in a judgment, they will he entitled to the remedy given by the statute to that class of claims, that is to say, to its payment out of any assets then in the hands of the executor, as such; but if none, by reason of payment of legacies and final distribution, they must seek their remedy from the devisees and legatees.

But on the admitted facts, the estate being otherwise ripe for payment of legacies, final accounting and distribution, and no contingent claim having been presented, the order which *suspends* the estate in the hands of the executor and prevents the payment of legacies and distributive shares, pending the litigation, gives Farley and the respondents a lien on the whole estate, which, the executor claims, is not contemplated by the statute.

It is proper to examine to what extent this statute has been already construed by this court.

If the Farley suit was pending in the courts of another State, that is to say, in a foreign court, as contradistinguished from a domestic court, then this court need go no further in the investigation, as the decision in *Commercial Bank of Kentucky vs. Slater, 21 Minn. 172*, would govern the case.

In that case the suit had been commenced against a decedent, during his lifetime, in the District Court for the County of Philadelphia. His administrator

was substituted as a defendant, and judgment entered against him as administrator. The estate was administered in Ramsey County, in this State. Commissioners were appointed and notice given, but this judgment was not filed as a claim. Over four years after the commissioners had filed their report, the judgment creditors filed a petition in the probate court that said judgment should be allowed as a claim against the estate, and *Section 16, Chap. 53*, was relied upon by the bank. This court, in construing that section, say, at page 173:

"Section 16, Ch. 53, * * * has reference to "actions pending in this State, *as it is not to be sup-* "*posed that our statute would attempt to regulate the* "*procedure of courts of other States.*"

I call the particular attention of the court to that portion of the above quotation which is italicised. And I respectfully ask whether it is to be supposed that our statute would attempt to regulate the procedure of the United States Circuit Court for the District of Minnesota to any greater extent than it would that of the courts of other States?

This court has, in *Turrell vs. Warren, 25 Minn. 9*, and in *Simon vs. Mann, 33 Minn. p. 412*, practically decided that the *judgments* of the United States court ought to be placed on the same footing with the domestic judgments of our own State, and treated accordingly; and that the federal court, sitting within the territorial limits of the State, is regarded as a domestic court and its judgments as domestic judgments; and that the United States Circuit Court for the District of Minnesota is a court of this State within the meaning of the insolvent act of 1881, but notwith-

standing all this, it is a court that our legislature cannot provide for or regulate its procedure.

Our legislature has, as a matter of comity, given the same force and effect to the transcripts of judgments of that court as to transcripts of judgments of any district court in the State.

But beyond this, our State law has not assumed to give a remedy to the claimant who is proceeding in the federal court, which he would not have if proceeding in the State court.

We may assume then, for the purposes of this case, that Farley, as well as the respondents, will be in the same position, when Farley shall procure his judgment in the federal court, that they or either of them would be if the case was pending in the district court of this county when judgment would be entered there.

The record here does not advise us as to the particular nature of Farley's claim; that is to say, whether it is direct or contingent; but whatever it may be, he had the absolute right to file and prove it as a direct claim, and have it adjudicated as such, or, to present it as a contingent claim, and have an order made by the court requiring the executor to retain an amount sufficient in its hands to pay it when it became absolute; and the respondents had the same right. And this remedy was open to them all if filed and proved or presented within the time limited by the order, notwithstanding the fact that the same cause of action was pending in the federal court, and without prejudice to that action. Such pending suit would not have been a bar to filing the claim, nor the filing the claim a bar to the action. Whatever doubt may have heretofore existed on this subject has been settled by the

Supreme Court of the United States in *Stanton et al. vs. Embrey, Admr., 93 U. S. 548*, and cases cited at page 554 of the opinion.

If Farley and the respondents have lost their grip upon this estate, it is only by reason of their neglect to avail themselves of the full and perfect remedy provided by the laws of the State, within the time limited. Farley prefers to abide by the results of his judgment, and when he obtains it he will be in the *third class* of claimants above referred to; that is to say, a claim under *Sec. 49*, which has not been filed, proved and adjudicated as a direct claim, nor presented as a contingent claim, and an order entered to retain, etc., under *Secs. 46, 47 and 48*, but a claim "which becomes absolute after the time limited for creditors to present their claims." If he proves it within one year thereafter, it will then be paid just as *Sec. 16* directs, i. e., "in the same manner as other claims duly allowed "against the estate."

Now, it may be claimed that the words, the "same manner," as used in this section, operate to *exempt* the claimant whose suit was pending at death of decedent, from either filing or presenting his claim to the Probate Court until after the claim has become "absolute" in the judgment; but there is nothing in the statute which will warrant or justify this construction. In what "manner" shall it be paid? If the estate is insolvent how shall it rank amongst preferred claims? If there were judgments already in existence at date of death of deceased, does it rank with them, or with claims on notes and accounts? How does it rank with the claims of those who have been diligent and filed or presented their claims according to the statute? The

manner of payment will *depend solely* upon what the claimant may have already done in the Probate Court to *secure* his claim.

If he pursues his action in the federal court or in the District Court of the State, ignoring the concurrent remedy in the Probate Court, and has not already procured a lien by attachment, garnishment or other *mesne* process during the life of decedent, then these courts can afford him no lien or remedy, except to have the amount of his claim adjudicated as a judgment. With this certified, he must then come into the Probate Court and avail himself of the benefits of having filed or presented his claim there, with diligence, or, take what he then finds in the possession of the executor, as the result of his *laches*.

See *Ball vs. Tompkins, 41 Fed. Rep. 486.*
Yonley vs. Lavender, 21 Wall. 276.
Rio Grande R. R. Co. vs. Gomela, 136 U. S. 478.

In the case cited from *136 U. S.*, the court say, at page 485:

"We do not recall any case now where the federal "courts have not paid respect to the principle that all "debts to be paid out of the decedent's estate, are to be "established in the court to which the law of his domi- "cile has confided the general administration of estates; "and that judgments against deceased, unaccompanied "by a seizure of property for their satisfaction, stand "in the same position as other claims against his "estate, and are to be *paid in the same manner.*"

The statute we have cited regulates the manner and order of payment; and both depend solely upon the degree of diligence with which the claimant has

availed himself of the remedy afforded. The fact that he is pursuing his remedy in the U. S. Circuit Court, does not in itself give him any *status* or consideration in the Probate Court, *pendente lite.*

These sections of *Chap. 53* offer a full and sufficient remedy for every possible claim against the estate of a decedent; and the construction we urge is in entire harmony with *Secs. 33 and 34*, which absolutely require that all estates *shall* be fully administered, within at least *three years* from the date of granting letters testamentary, or admiaistration, with two exceptions: first, (under *Sec. 34*,) where, under the provisions of the will, a longer time may be necessary; and second, (under *Sec. 36*,) where the first executor or administrator dies, or becomes incapable, and a new administrator is appointed.

In the case of *appeals*, etc., (under *Sec. 40*,) or, in the case where a *contingent claim* has been *presented*, and has not become absolute, and an order to retain, etc., has been entered, (under *Sec. 48*,) the Probate Court may suspend sufficient funds in the hands of the executor or administrator to abide the result of the appeal, or of the adjudication of the contingent claim; but in both of these events there shall be a distribution of the balance not so suspended or retained.

The admitted facts here do not show the existence of either of the two exceptions, nor any reason why any part of the estate should either be suspended or retained, or otherwise held from the possession of its lawful owners, the legatees and devisees of the deceased testator.

The construction above given of these statutes, is in full harmony with the decision of this court, in the case

of *McKeen vs. Waldron, 25 Minn. 466.* The conclusions of the court in that case, on *pages 469, 470 and 471*, necsssarily decide this case.

The case of *Berkey vs. Judd, 27 Minn., p. 475*, is a somewhat similar case; in that case, the claim had not been filed as a contingent claim, and was not presented to the court until after the judgment had been obtained, and after the time limited for the presentment of claims had expired. But the court finds that there was sufficient property still in the hands of the executor to pay this judgment when it was presented, as well as all other claims against the estate, and that *therefore* it is entitled to be paid with the other debts.

I have had some difficulty in harmonizing the case of *Fern vs. Leuthold, 39 Minn. 212*, with the cases of *McKeen vs Waldron* and *Berkey vs. Judd, ante*, as I could not at first understand why it was, that in that case, which was a case of a judgment certified under *Sec. 16*, and in which no contingent claim therefor had been presented to the court; but there had been a final decree of distribution entered in the Probate Court over two years before the judgment had been obtained and certified.

But on careful examination I find that the question of the validity of the order vacating the decree of distribution was not *involved in this case*. I find that it was involved in a *former* case between the same parties, and decided in *25 Minn. 99*, which case affirmed the decision of the courts below (probate and district), which had vacated the decree of distribution on grounds raised in that case; so that when the case again came before this court on the second appeal (*39 Minn. 212*) the order vacating the decree of distribu-

tion was *res adjudicata*, and the property of the estate, for the purposes of the last appeal, *was in the hands of the executrix* by reason of the then existing vacation of the decree of distribution. (This will be found from an examination of the findings and conclusions on which the judgment appealed from was founded, on page 148, folios 737 and 738 of the Paper Book, in the case last cited.) The conclusion of the district court being "that the respondents in this matter are entitled "to have their respective judgments *paid out of the "funds remaining in the hands of such executrix.*" These facts make the case similar in all respects with the case of *Berkey vs Judd*, except that this court found *other* reasons in the amended pleadings to release the estate from the payment of such judgments.

And the following language, used by this court at page 216, points to no other conclusion but that the plaintiffs in the action in which the judgment was afterwards rendered ought, *pendente lite*, and before the time limited for filing claims had expired, to have presented their claim in the probate court as a contingent claim, and obtained an order requiring the executor to retain, etc., under *Sec. 46:*

"If they had an action on their claims pending "against Fern at the time of his death, there would be "no necessity for presenting them to the probate court "for allowance in order to make them payable out of "the estate. *Berkey vs. Judd, 27 Minn. 475*, (*8 N. W. "Rep. 383.*) But they knew that the estate was in "process of administration. The litigation in the dis- "trict court was protracted far beyond the time usually "allowed for the settlement of estates. They and their "counsel were residents of the county in which the

"administration of the estate was being had, and yet "during the time it was being administered, and for two "years afterwards, it would seem, they never interested "themselves in the matter enough to ascertain what "was being done. Ordinary prudence would certainly "have suggested that they ascertain what was being "done with the estate, and, if any steps were being "taken that might prejudice their rights, to call the "attention of the probate court to the pendency of "their suit, so that administration might not be finally "closed until the cause was determined."

Respectfully submitted,

HARVEY OFFICER,
Atty. for the St. Paul Trust Co., Exr., etc.,
Appellant.

150 U.S. 572

Office Supreme Court U. S.
FILED,
OCT 20 1893
JAMES H. McKENNEY,
Clerk

150 U.S. 572

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

No. ~~207.~~ 56

JESSE P. FARLEY,
Appellant,

vs.

JAMES J. HILL, THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, AND THE ST. PAUL TRUST COMPANY, AS EXECUTOR, ETC., OF NORMAN W. KITTSON, DECEASED,
Appellees.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF AND ARGUMENT FOR APPELLANT.

GEORGE F. EDMUNDS,
HENRY D. BEAM,
EDWARD D. COOKE,
OF COUNSEL FOR APPELLANT.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

No. 287.

JESSE P. FARLEY,

Appellant,

vs.

JAMES J. HILL, THE ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, AND THE ST. PAUL TRUST COMPANY, AS EXECUTOR, ETC., OF NORMAN W. KITTSON, DECEASED,

Appellees.

Appeal from the Circuit Court of the United States for the District of Minnesota.

BRIEF AND ARGUMENT FOR APPELLANT.

PART I.—INTRODUCTORY.

I.

STATEMENT OF THE CASE.

This is a bill to compel a discovery, accounting, and the delivery to complainant of certain stock, funds and property in the hands of the defendants, Kittson, Hill and the Manitoba Railway Company, the proceeds and profits of a joint undertaking carried out between the complainant and defendants.

The case grows out of the sale under foreclosure decrees of the railroad lines and other property of the St. Paul and Pacific Railroad Company and the First division of the St. Paul and Pacific Railroad Company, and the acquisition thereof by the defendant, the St. Paul, Minneapolis and Manitoba Railway Company, through the use of certain mortgage bonds, purchased and held by defendants, Kittson and Hill, for the joint account, use and benefit of themselves and complainant.

The defendants, Kittson, Hill and the Manitoba Railway Company, having come into possession of the proceeds and profits of this undertaking, including a large amount of stock of said company and other property, and having refused to account with complainant or to deliver to him his share of said profits and proceeds, on November 13, 1880, he filed his bill in the United States Circuit court for the district of Minnesota, and on December 15, 1880, filed his amended bill, in substance, as follows: (Rec., 4–14.)

THE AMENDED BILL OF COMPLAINT

alleges, in substance:

1. That in 1876 complainant, and defendants Kittson and Hill, agreed jointly to purchase all the bonds possible to be obtained of said St. Paul Company and of said First Division Company, said bonds being for sale at a large discount, mortgages securing them being in process of foreclosure in five suits in courts in the State of Minnesota. The object was to use the bonds in purchasing the lines of road, etc., when sold under foreclosure decrees.

It was further agreed that Kittson should procure the necessary funds from Donald A. Smith and other capitalists in Canada, giving such persons a one-half interest in the enterprise; the remaining interest to be for the joint benefit of complain-

ant, Kittson and Hill. The procuring the funds and purchasing the bonds were to be conducted by Kittson and Hill and complainant was to furnish facts, information, advice and assistance as required.

That complainant had knowledge not possessed by the others as to the whereabouts and situation of the bonds, their rated value by the holders, the mode whereby they could be reached and procured, the situation, amount, character and value of the lines of railroad and other property, and in respect to the pending foreclosure suits; and his services and co-operation were indispensable to the success of the enterprise.

2. That Kittson procured Donald A. Smith and George Stephen to furnish the funds necessary to purchase or secure control of the bonds, and agreed to give them a one-half interest, the balance belonging to complainant, Kittson and Hill, equally, under their agreement.

3. In 1877 negotiations were commenced by Smith, Stephen, Kittson, Hill and complainant, continuing to June, 1879, resulting in the purchase and securing of over $25,000,000 of said bonds, face value and overdue interest. The purchases were made in the name of Smith, Stephen, Kittson & Hill, pursuant to the agreement. Throughout said negotiations and purchase complainant was continually called upon by Kittson & Hill, and at their request furnished facts, information, advice and co-operation, without which such negotiations and purchase would not have been successful. Most of the bonds were purchased under agreement with the holders that payment should not be made until the railroad lines and other mortgaged property should be sold under foreclosure decrees, and acquired by the purchasers, and a new issue of bonds made, secured by a new mortgage on the same property, whereupon it was optional with the seller of the bonds to be

paid at the agreed price, or to take the new bonds of the new company.

It was the understanding of all parties that as soon as the lines of railroad, etc., should be acquired under the foreclosure sales, a new issue of bonds should be made by them, or by the new company to be organized to take and operate said property, secured by a new mortgage of sufficient amount to defray the cost of the bonds purchased, and all other expenses of said enterprise.

That nearly all of said bonds were held and owned in Holland, Europe; and John S. Kennedy, of New York, was the agent and attorney in the United States of a large majority of the owners of each class and issue of said bonds, with full power and authority to act in respect thereto, as in his judgment might seem best; that he was also trustee in all of said mortgages (excepting the one for $15,000,000 on the Extension line), and was agent for, and held and represented over $11,000,000 of the bonds secured by the $15,000,000 mortgage; that he was plaintiff in all of said suits, except the suit to foreclose the $15,000,000 mortgage; that all of said suits were caused to be commenced by him, and were prosecuted under his control and direction as such agent and trustee, and complainant was appointed receiver of the property of the St. Paul and Pacific Railroad Company, and was made general manager of the lines of road of the First Division of the St. Paul and Pacific Railroad Company, under the trustees in said mortgages in possession thereof, upon the recommendation and request of said Kennedy.

That after said agreement between complainant, Kittson & Hill, and before decrees of foreclosure in said suits, and while negotiations were pending for the purchase of said bonds, complainant informed Kennedy of his interest and connection with Kittson & Hill in said purchase, and Kennedy had full notice and knowledge thereof, and fully approved and sanc-

tioned the same; that said negotiations were mainly had with and conducted by Kennedy on behalf of the bondholders, as their agent, and the bonds, when purchased, were placed in the hands of Kennedy and his partner, John S. Barnes, as trustees, to be held until paid for as contracted, and were only delivered on such payment; that Kennedy strongly recommended the bondholders to sell their bonds on the terms offered by Smith, Stephen, Kittson & Hill, as the best disposition that could be made of them, and that very few of said bonds were purchased, except through said negotiations with Kennedy.

That to all inquiries made by Kennedy, or any of the trustees in said mortgages, or by any of the bondholders, or by any one interested in said property, complainant always gave full and true answers and information to the best of his knowledge and ability, and kept Kennedy fully informed of all facts and matters affecting said property, and in all things acted honestly and in good faith toward all persons interested in the property under his control as manager or receiver.

That the suit in which complainant was appointed receiver of the property of the St. Paul and Pacific Railroad Company, was not a suit to foreclose aay mortgage, but was commenced by Kennedy aud others simply to have a receiver appointed of said property, for its preservation, and the completion of certain unfinished sections of said line of road.

4. The defendant, the St. Paul, Minneapolis and Manitoba Railway Company, is a corporation organized in May, 1879, by Smith, Stephen, Kittson and Hill, for the purpose of acquiring and operating said lines of railroad and mortgaged property, for the use and benefit of the parties interested in the purchase of the bonds, and Smith, Stephen, Kittson and Hill are officers and directors of said company, and have the control and management thereof.

5. That in March and April, 1879, foreclosure decrees were

entered directing the sale at auction of said railroad property, and providing that the mortgage bonds and overdue coupons should be taken in payment as cash for such an amount as would equal the dividend to which they would be entitled, *pro rata*, under the decrees; and in May and June, 1879, the lines of railroad and other mortgaged property were bid in and purchased at said foreclosure sale by the St. Paul, Minneapolis and Manitoba Railway Company, for the use and benefit of the parties interested in the purchase of said bonds, including complainant, by the direction and procurement of Kittson, Hill, Smith and Stephen; that said bonds were used in payment for the property, and the railway company paid nothing, but took the same without consideration, except that furnished by complainant, Kittson, Hill, Smith and Stephen. Thereby over 500 miles of railroad, with equipments, and over 1,000,000 acres of land and other valuable property, worth in all over $15,000,000, were acquired by said railway company for the use and benefit of complainant, Kittson, Hill, Smith and Stephen, in proportion to their respective interests, subject only to the advances made, and expenses and obligations incurred in carrying out said enterprise. And Smith and Stephen then and there had notice and knowledge that complainant was jointly and equally interested with Kittson and Hill in the bonds so purchased and in said undertaking.

6. That on June 21, 1879, said defendant railway company, by direction of Smith, Stephen, Kittson and Hill, issued and negotiated its bonds for $8,000,000, payable in 1909, secured by mortgage on the lines of railroad, land, etc., of the company, and said new bonds and proceeds were used, so far as necessary, to pay the cost of the bonds purchased and all other expenses of said enterprise, and were more than sufficient therefor.

7. That since June 15, 1879, the defendant company, under the control of Smith, Stephen, Kittson and Hill, has been in

possession of, and operated said railroads, and has received from earnings, above expenses and interest on bonds, over $500,000, and has received large sums from the sale of lands, and has made expenditures, the amount of which complainant is unable to state.

8. The stock of said defendant railway company, $15,000,000, divided into shares of $100 each, which are worth par, represents the property so acquired, and constitutes, in part, the profits of said enterprise; but, in addition, other profits of many hundred thousand dollars have been realized from said enterprise, and divided between Smith, Stephen, Kittson and Hill, and a large amount of said capital stock has been issued and divided between them, viz: 57,646 shares—to Kittson one-half thereof, and to Hill one-half thereof, being a portion of that to which they and complainant were entitled under said agreement.

9. That Kittson & Hill never denied, but always admitted and recognized the right of complainant under said agreement, to an equal share with them in the profits of said enterprise, until after the organization of said new company.

But defendants now pretend complainant has no interest in said enterprise or its results, and refuse to turn over to him any of said stock, or to account to him for any of said profits, and claim, to the exclusion of the complainant, all the profits to which Smith & Stephen are not entitled; and said railway company conspiring with them to cheat and defraud complainant, refuses to account to him for his interest in said property or the profits, which have come to its possession, or to issue to him any of said capital stock.

Prayer that Kittson & Hill discover the terms of their agreement with Smith & Stephen; the amount and cost of bonds purchased; amount of expenses and of money actually furnished by them, and by Smith & Stephen; when and for what

purpose paid out, and from what source repaid; what dividends or profits in money, bonds, stock, etc., have been received by or turned over to them by said company, and for what consideration; what property is now held by said company, and what lands have been sold by it; when and for what consideration; and what use has been made of the bonds and proceeds thereof, issued by said company; that an account may be taken, and Kittson & Hill be decreed to pay over to complainant one-third of all moneys, bonds, stock, etc., found to have been received by them. That complainant be decreed entitled to an equal interest with Kittson & Hill in said undertaking and profits; that the railway company be decreed to issue to complainant his just proportion of its capital stock, and to account to him for his share of the property and profits in its possession, to recognize his rights in said stock and profits as equal with Kittson & Hill, and for general relief.

The Plea of Defendants.

Plea of defendants, Kittson & Hill, to the whole of the amended bill, filed February 16, 1882, in which the defendant railway company joined, after its demurrer to the bill had been overruled; after reciting the several issues of mortgage bonds by the St. Paul Company and the First Division Company, the filing of the Kennedy bill in 1873, the appointment of complainant as receiver of the extension lines, the resignation and removal of certain trustees, the appointment of John S. Kennedy in their place, and the taking possession by Rice, Thompson & Kennedy, as trustees, October 9, 1876, of the main and branch line of the First Division Company, alleges in substance that:

From that time until said lines, etc., were sold under foreclosure decrees and turned over to the purchasers, said trus-

tees held and operated the same, and complainant was general manager of said lines for the trustees; and complainant continued to be receiver of the lines of the St. Paul Company covered by said $15,000,000 mortgage, and managed and operated the same, or such parts thereof as were from time to time constructed and fit for operation, until the same were sold under foreclosure decrees and turned over to the defendant, the St. Paul, Minneapolis and Manitoba Railway Company; and complainant has not yet been discharged as receiver nor settled his final accounts as such.

That complainant never informed Kennedy or any of the bondholders, of his interest in the project of purchasing said bonds and acquiring the mortgaged property, nor did Kennedy or any of the bondholders know or suspect, or have any information or belief, at any time until after confirmation of the foreclosure sales, that complainant claimed such interest.

That as receiver of the lines of the St. Paul Company covered by said $15,000,000 mortgage, complainant could not lawfully make said agreement or engage in the enterprise of purchasing said bonds, or the property covered by said mortgage; and his making such agreement and embarking in such enterprise was a breach of trust and fraud on the bondholders of said $15,000,000 issue and on this court.

That as general manager for the trustees in said mortgages of the lines of the First Division Company, complainant occupied a trust position towards his employers, said trustees and the bondholders, and by making said agreement and engaging in said enterprise, was guilty of a breach of trust and fraud upon the trustees and bondholders.

That by reason of said fiduciary positions occupied by complainant, he is not entitled in equity to any relief.

THE DECREE ENTERED BY THE CIRCUIT COURT JULY 15, 1882,

Recites: This cause having been heard upon the bill of complaint, pleas, replications and proofs, it is ordered, adjudged and decreed, that the pleas of the defendants to the plaintiff's bill of complaint herein be, and the same are hereby sustained; and that said bill of complaint be, and the same is hereby dismissed out of court, and that defendants recover of plaintiff their costs, to be taxed, and that execution issue therefor. (Rec., 1.)

PROCEEDINGS UPON AND AFTER APPEAL.

The complainant having appealed from this decree to the Supreme court of the United States, the case was argued in this court at the March term, 1886; and after consideration, the court of its own motion ordered a re-argument at the October term, 1886; and after full re-argument, the court on February 7, 1887, reversed said decree, and remanded the cause with directions to overrule said plea, and to order the defendants to answer the bill.

Farley v. *Kittson*, 120 U. S. Rep., 303.

The cause having been by the Circuit court, at the March term, 1887, redocketed, and an order entered overruling the plea and requiring the defendants to answer the bill, the defendants on June 6, 1887, filed their joint and several answer in substance as follows:

ANSWER OF DEFENDANTS.

Joint and several answer of all of said defendants, after reserving to themselves benefit of exception, etc. (Rec., 14–35):

I. Deny that in the summer of 1876, or at any other time, Kittson and Hill made with plaintiff the agreement mentioned

in subdivision I, or any agreement for purchase of bonds on joint account, or to purchase the railroad lines; or that defendants or plaintiff ever engaged in the enterprise in said bill and particularly subdivision I, mentioned.

Deny that Kittson and Hill ever did anything under, or to carry out said enterprise. Deny that Kittson ever made the representations mentioned in subdivision I. Deny it was agreed that Kittson should give to Donald A. Smith any interest, or that any interest should be held for defendants or plaintiff or any of them. Deny that Kittson and Hill, or either, made negotiations with plaintiff for procuring funds or for purchase of the bonds mentioned.

Deny that Kittson and Hill agreed that plaintiff should furnish facts, information, etc., or render aid and assistance in negotiations as should be required of him. Deny that plaintiff had any knowledge not possessed by Kittson and Hill as to the whereabouts of the bonds, their rated value by holders, mode of reaching or procuring them, or as to situation, character and value of railroad lines, or as to pending suits; or that his services were indispensable to the success of said pretended enterprise.

II. Especially as to subdivision II of bill:

Deny that Kittson made arrangements stated; or procured Smith or Stephen to join in pretended enterprise, or to furnish funds, or to purchase or secure control of bonds, or agreed to give Smith & Stephen any fraction or interest; or that any balance of interest ever belonged to plaintiff or Kittson and Hill in equal or any proportions, as alleged in bill.

III. Answering subdivision III of bill:

Deny negotiations were opened or carried on by Smith, Stephen, Kittson, Hill and plaintiff, or any of them, for purchase of any bonds under said pretended agreement, or that any bonds were so purchased by Smith, Stephen, Kittson and

Hill, or any of them, under any understanding with plaintiff, or that plaintiff had any interest in or took any part in the purchases of any bonds by Smith, Stephen, Kittson and Hill, and deny that Kittson and Hill ever negotiated for or purchased bonds except as hereinafter stated. Deny that plaintiff was continuously, or ever, called on by Kittson or Hill, or either of them, for facts, information, advice, etc., or that plaintiff ever furnished or rendered the same, under said pretended agreement or otherwise. Deny that said negotiations received any aid from plaintiff, or that any of the purchases of bonds mentioned in bill were made under said pretended agreement, or any understanding as to new issue, etc. Admit that nearly all outstanding bonds in 1876 were owned in Holland, and Kennedy was by committee of bondholders appointed their agent and attorney for certain purposes, but deny he had the authority mentioned in bill, or, prior to December, 1877, any authority to conclude sale of bonds. Admit mortgage made in 1871 to secure bonds of $15,000,000 by St. Paul and Pacific Railroad Company, on its lines from Sauk Rapids to Brainerd, and from St. Cloud to St. Vincent, land grants, etc., and that in suit by Kennedy *et al.*, brought to foreclose said mortgage and for receiver, plaintiff was appointed receiver August 1, 1873, and continued in possession and operation of said lines as such receiver at the time of alleged making of the pretended agreement with Kittson and Hill.

Admit Kennedy was agent for holders of $11,000,000 of said bonds, and plaintiff in all of said foreclosure suits, except the suit brought by the trustees of the fifteen million dollar mortgage to foreclose the same; and that suits were commenced by Kennedy as stated, and plaintiff was appointed receiver and general manager as stated, at the instance of Kennedy. Deny that plaintiff, before bringing his suit, informed Kennedy of his alleged interest and connection with Kittson and Hill, or that Kennedy had notice and knowledge thereof, or ever approved or sanctioned the same.

Aver that plaintiff falsely informed Kennedy he had been offered an interest by Kittson and Hill, but did not then or at any time, inform Kennedy of said pretended agreement, or the terms of such offer, or that he had accepted or intended to accept such offer. Aver that the statement by plaintiff to Kennedy was wholly false and Kittson and Hill never offered plaintiff any interest in any purchase of bonds.

Aver that allegations in subdvision III of bill as to negotiations by Kennedy, disposition of bonds purchased, and recommendations by Kennedy, are wholly untrue, so far as relates to any transaction in which plaintiff was interested. Neither admit nor deny that plaintiff gave full and true answers and information to all inquiries by Kennedy, bondholders and others; but deny plaintiff acted honestly and in good faith to stockholders and bondholders interested, and say plaintiff never informed Kennedy or stockholders or bondholders he had made said agreement or acquired said interest in the enterprise of purchasing said bonds and railroad lines.

IV. Admit the St. Paul, Minneapolis and Manitoba Railroad Company is a corporation, organized in May, 1879, by Kittson, Hill, Smith, Stephen and John S. Barnes, capital $15,000,000, for purposes alleged in bill, etc., but deny it was in any way for use or benefit of plaintiff. Admit that when the bill was filed Kittson, Hill, Smith and Stephen were directors, and all except Kittson are still directors of said company.

V. Admit entry of foreclosure decrees in March and April, 1879, as alleged; sales in May and June, 1879, and that in all except the $2,800,000 mortgage the defendant railway company was the purchaser; but deny any interest of plaintiff therein. Deny that any bonds were used in payment which were purchased under said pretended agreement, or in which plaintiff had any interest. Admit that at said sales certain bonds purchased by Kittson, Hill, Smith and Stephen were used in payment, and that the residue of the consideration was paid

by them. Deny that plaintiff furnished any of the consideration, or that he was interested in the purchase, legally or equitably, or in the railroad property acquired. Deny that Smith or Stephen or said company ever had notice that plaintiff was interested with Kittson and Hill, or that he claimed such interest until suit was brought by plaintiff in June, 1879, in the District court of Ramsey county, State of Minnesota, for the same relief he prays in this bill.

VI. Admit that on June 21, 1879, the defendant railway company, by its directors, *inter al.*, Kittson, Hill, Smith and Stephen, issued and negotiated the bonds mentioned in subdivision VI of the bill. But deny the proceeds were used to pay cost of bonds, etc., in which plaintiff was interested.

VII. Admit that the defendant railway company since June 21, 1879, has been and still is in possession of the railway lines and other property mentioned, and has operated the same and has received over $500,000 above expenses and interest on new bonds, and has sold land, etc., etc., as alleged in subdivision VII of bill (but not property acquired as alleged).

VIII. Deny that the capital stock of the defendant railway company represents property acquired or profits arising out of said pretended enterprise. Admit issue to Kittson and Hill, each of 28,823 shares of stock worth $100 each share. But deny this is a portion of the stock to which plaintiff, Kittson and Hill are entitled, or in which plaintiff has any interest under said pretended agreement or otherwise.

IX. Aver Kittson and Hill never heard of said pretended agreement until plaintiff brought suit in the State court, in Minnesota, in June, 1879. That Kittson and Hill never admitted or recognized plaintiff's interest in the purchase or the property acquired, or in said enterprise. Deny defendants have colluded or confederated to wrong plaintiff, and deny that Kittson and Hill, or either, ever claimed to have advanced

money in carrying out the enterprise alleged in the bill, or that defendants ever received any profits from the pretended enterprise alleged in the bill.

X. Aver that the bonds and mortgages and property therein embraced, which are mentioned, but not described in said bill, were as follows: Here follows pages 18 to 25, inclusive, of the answer, a recital of the various issues of bonds and mortgages of the St. Paul and First Division Companies, the filing of the Kennedy bill, appointment of complainant as receiver and general manager; resignations, removals and substitution of trustees, precisely as alleged in the plea heretofore filed and overruled, and then:

(1.) That as receiver planitiff could not lawfully make said pretended agreement with Kittson and Hill for the purchase of said bonds and of the property of which he was receiver, nor was it lawful for him to engage in said enterprise.

(2.) That said pretended agreement, if ever made, (which defendants do not admit), was contrary to public policy and void, and the making of such an agreement and embarking in such enterprise was a breach of trust on plaintiff's part as receiver, and a violation of his duties to all persons interested, and to the court.

(3.) That as general manager of the First Division lines, plaintiff held a position of trust and confidence to the trustees, stockholders and bondholders, and could not lawfully make said pretended agreement and engage in said enterprise, but the same, if made, was against public policy and void. Wherefore, plaintiff is not entitled to maintain this, or any other suit, to enforce said pretended agreement.

XI. Aver that in the spring of 1887, Kittson and Hill, with Stephen and Smith, agreed to purchase, on joint account, said bonds, if they could be obtained on satisfactory terms

and prices, and in sufficient numbers, and to dispose of them in acquiring the mortgaged property, or otherwise; but plaintiff was not a party to said agreement, nor interested therein.

That the bonds had been originally nogotiated in Holland, and a large number was held by the Dutch committee, which facts, and the names of the committee, were matters of common knowledge and notoriety in St. Paul since 1873. Said bonds and coupons, which were receivable at par for lands, were greatly depreciated, and were in active demand for use in payment for lands, and were freely bought and sold in Holland and transmitted to St. Paul, and had a price and value generally known in Holland and in St. Paul.

That prior to making their said agreement, Kittson, Hill, Smith and Stephen, had fully informed themselves of the situation, character and value of the railroad lines and property mortgaged, and as to the pending foreclosure suits, and as to the bonds and mode of procuring the same, and the current prices thereof.

That plaintiff had no special or peculiar knowledge as to these matters and defendants never resorted to him or received from him information; that the rated value of the bonds held by the Dutch Committee on a sale in gross, was not known to plaintiff, and could only be arrived at by negotiations with the committee, and in May, 1877, Kittson, Hill, Smith and Stephen opened negotiations, continuing until the following winter when the conduct thereof was entrusted by the committee to Kennedy, as agent, and on February 24, 1878, the purchase was concluded; the contract of purchase was transmitted to Holland for execution by the committee, and was executed about March 13, 1878, and defendants believe that Kennedy recommended said sale, as per contract.

Defendants refer to Schedule A, copy of said agreement

hereto attached. Plaintiff took no part in these negotiations, or in making the agreement, nor was he called upon for, nor did he furnish facts, information, etc., nor was the success of the negotiations in any way owing to plaintiff.

That Kittson, Hill, Smith and Stephen acted solely for themselves in the purchase, and not in any manner for plaintiff or under any agreement with him.

That Kittson, Hill, Smith and Stephen made a supplemental agreement with the Dutch committee, whereby other outside bonds would be purchased, and that other and additional bonds were purchased by them, but not for use or benefit of plaintiff. That the cash payments required in the purchase of bonds and at the foreclosure sales were furnished by Kittson, Hill, Smith and Stephen under their agreement, and not by Smith and Stephen alone as alleged. The greater part, many hundreds of thousands of dollars, were raised on their negotiable paper, secured by collaterals of Kittson and Hill, as well as of Smith and Stephen. That most of the bonds so purchased were used at the foreclosure sales, and a smaller part prior to the sales, in payment for lands. The provisions of the contract with the Dutch committee were fully performed by Kittson, Hill, Smith and Stephen, except article 20 (found impracticable), and as to that a supplemental agreement was made May 23, 1879. That May 7, 1879, the Branch line was sold under foreclosure of the $2,800,000 mortgage, and purchased by John S. Barnes (trustee under the agreement with the Dutch committee), and thereupon Barnes and Smith, Stephen, Kittson and Hill organized the St. Paul, Minneapolis and Manitoba Railway Company, which thereupon acquired the property purchased, and thereafter purchased the other mortgaged property at the foreclosure sales, and used in payment the bonds aforesaid, said bonds and overdue coupons being received as cash to the amount of the dividend payable thereon under said decrees from proceeds of sales. The whole consideration was furnished

by Smith, Stephen, Kittson and Hill under their agreement, and no part by, or on account of plaintiff, or under any agreement with him. Deny that any part of the property was acquired for use and benefit of plaintiff, or that the defendant railway company, Smith or Stephen ever had any notice that plaintiff had any interest in said bonds or agreement.

Aver that the issue of $3,000,000 of First Mortgage bonds of Manitoba company, June 21, 1879, and proceeds thereof, were not enough to pay for the bonds bought by Smith, Stephen, Kittson and Hill, and the expenses required by the agreement with the Dutch committee, and other outlays in acquiring bonds and moneys paid at decretal sales.

That Kittson and Hill never admitted plaintiff had any interest in their agreement with Smith and Stephen, or in any transactions thereunder, or bonds or mortgaged property purchased, or in the stock of Manitoba company, nor did they or either of them ever hear of any claim by plaintiff to such interest until his suit brought in June, 1879, in the State court of Minnesota. Nor did they ever suggest, intimate or recognize his right to a share in the profits accruing from said transactions.

That the bonds purchased by Smith, Stephen, Kittson and Hill were the only bonds used in the purchase of the mortgaged property at foreclosure sales, and said purchases under said agreement were the only purchases, prior to July, 1879, of any bonds of said railroad lines made by said Kittson and Hill, or in which said Kittson and Hill were in anywise interested.

Conclude with general traverse. (Rec., 14–35.)

To this answer complainant filed a general replication on June 23, 1887 (Rec., 46), and thereafter, pursuant to written stipulations, and orders and commissions issued for that purpose, evidence was adduced and testimony taken in said cause,

by and on behalf of the complainant, and by and on behalf of the defendants; pending which, on May 10, 1883, said defendant Norman W. Kittson, departed this life testate; and on June 25, 1888, the St. Paul Trust Company became the duly appointed and qualified executor of the last will and testament of said decedent, and entered its appearance in this cause June 30, 1888, whereupon, on October 5, 1888 (*nunc pro tunc* as of July 9, 1888), it was ordered by said Circuit court that this case stand revived as against said executor. (Rec., Vol. 2, p. 1,313, 1,315.)

And the cause coming on to be heard upon the pleadings and proofs, at the December term, A. D. 1888, of said Circuit court, and having been argued by counsel, the court, on September 27, 1889, entered a decree dismissing the bill at complainant's costs. (Rec., p. 1,785, Vol. 2.)

The opinion of Judge Brewer is found on pages 1,773 to 1,785 of the record, Volume 2.

The complainant thereupon prayed and was allowed an appeal to this court (Rec., Vol. 2, p. 1,786-8), and perfected the same by filing bond as required, approved by the court on September 27, 1889. (Rec., Vol. 2, p. 1,790.)

Citation issued and service thereof duly acknowledged September 30, 1889 (Rec., Vol. 2, p. 1,804), and the cause docketed in this court at the October term, A. D. 1889.

II.

Assignment of Errors.

1. The testimony of defendant Hill, and of the witnesses called for corroboration thereof, viz: Upham, Galusha, Newall, Smith and Saunders, as to statements made by Hill to them, and conversations by them with Hill, not in the presence of complainant, having been specifically objected to when given,

was manifestly incompetent, immaterial and inadmissible and the court below erred in receiving and considering the same.

2. The testimony of John S. Kennedy for the defendants, as to matters which had been passed upon by the Supreme court in its decision on defendants' plea (*Farley* v. *Kittson*, 120 U. S., Rep., 303), was incompetent and inadmissible in evidence, and the court below erred in receiving and considering the same.

3. Defendants below having called the complainant and examined him as their own witness are bound by his testimony, except as they have proven the contrary by other evidence, and cannot now impeach his testimony.

4. The court below erred in dismissing the complainant's bill, under the issues made by the pleadings, and the facts as proven in the record.

5. The court below erred in entering its decree of September 27, 1889, dismissing the bill of complaint herein, in substance, manner and form as aforesaid.

III.

THE ISSUES ARISING UPON THE PRESENT RECORD.

1. There is neither averment nor proof in the record of any fraud in the means employed to purchase the bonds, nor in their use in payment for the property at the foreclosure sales.

It does not appear that anything was done, or left undone, by complainant, or by Smith, Stephen, Kittson, or Hill, by which the bonds or the mortgaged property were depreciated in value; or that any form of circumvention, deceit, lying or false representation was used as to the intrinsic market, or prospective value of the bonds or the railroad lines; or as to

the prospects or probable future of the property; or as to the difficulty, time, expense, or hazard of foreclosing the mortgages; nor does it appear that any fraudulent means were used to induce the bondholders to sell their bonds, or to sell them at less than their value, or in procuring the signatures to the option agreement under which the bonds were sold, nor that the possession of the bonds was obtained without paying the agreed price, or without complying with the terms of the agreement. On the contrary, the record is full of evidence to show the fairness and good faith observed in the transactions by which the bonds were purchased, and used in payment of the mortgaged property at the foreclosure sales, and in the reorganization of the railroad lines etc.

It is clearly proven that the reason why the bondholders of the St. Paul and Pacific and First Division Companies did not themselves enter into a plan of reorganization and purchase the property at the foreclosure sales by the use of their own bonds, and for their own benefit, was that a large sum of money was required to complete the extension lines and save the land grant, and that the Dutch bondholders were unable or unwilling to invest the amount required.

Appeals to them to do this, repeatedly made, from the year 1873 to the year 1877, and to their representatives, the Dutch committee, by the complainant, by John S. Kennedy their trustee, and by John Carp one of their members, who several times visited this country and made exhaustive investigation and report to the bondholders as to the affairs and condition of the mortgaged property—were all in vain. The bondholders, with full knowledge and information as to the state, condition, affairs and prospects of these mortgaged railroad lines as they then existed, and after full consultation with them by their committee, deliberately refused to advance the fund required, or to adopt the plan of reorganization recommended to them as shown in Carp's report (Rec., 512), or to enter

upon any plan of their own for purchase and reorganization, but preferred to sell their bonds. And at one time, when it seemed that the negotiations which had been entered into would fail, actually insisted upon holding the purchasers liable in damages for any failure to complete the purchase.

Thereupon the agreement of twenty-seven articles, dated March 13, 1878, by which the bonds were purchased, was executed in behalf of the bondholders by the Dutch committee. This agreement was referred to, sanctioned and approved by the court, in the order of May 31, 1878, under which the extension lines were completed with money furnished by Smith, Stephen, Kittson and Hill. Before entering this order, the court required a careful investigation and report of all the facts by Messrs. T. C. Reynolds and J. B. Henderson, commissioners appointed by the court, and their recommendation and approval of its provisions. A copy of this order was served upon the Dutch committee, and they executed and filed in court their formal and express consent to its provisions. This order carefully guarded the interests of the bondholders. Under it the bonds purchased were held in *escrow*, by trustees, agreed upon by the Dutch committee, representing the bondholders, until the final carrying out of the agreement. And, under the agreement, the sellers of the bonds were given the option, after the reorganization had been effected, to take stock and bonds of the new company, or to demand cash at the agreed price.

After the purchase of the bonds, the purchasers advanced the large amount of money required, and the extension lines were completed under the order and approval of the court, thereby saving the land grant from forfeiture; and by the terms of the order, any bondholder was accorded the right, at any time before the foreclosure sales, to pay his *pro rata* share of this expense, and thereby place himself in equal right and interest with the purchasers.

By the decree of foreclosure of the $15,000,000 mortgage, entered April 11, 1879, the right secured by said order of May 31, 1878, to any bondholder to acquire a share in the debentures on the terms therein provided, was extended until the day of sale of the mortgaged property under said decree. And the court reserved the right, on the confirmation of the sale, to make an order, if it should then seem equitable so to do, whereby the outstanding bondholders might, within a time to be fixed by the court, be allowed to come into the new organization, on equitable terms then to be prescribed. (Rec., 438, 448.)

It is unnecessary, however, to occupy space, or consume the time of the court, further than to point out the main and leading facts above detailed. It is sufficient to say that the defendants have not in their answer alleged any actual fraud whatever, either in the purchase of the bonds and mortgaged property, or in any acts or conduct of the complainant in connection therewith.

2. The main issue of fact on this record is, whether the defendants, Kittson and Hill, ever entered into the agreement and undertaking with complainant alleged in the bill, whereby complainant became a party interested with them in said enterprise, and entitled to a share with them in its resulting profits.

3. The main question of law arising on the record is whether, as set up by defendants in their answer, the said agreement, by reason of complainant having been receiver of one of the railroad lines and general manager for the trustees in possession of the other, was, in its inception, and always has been wholly void as against public policy.

PART II.—THE FACTS.

COMPLAINANT'S CASE AND PROOFS.

We submit that the complainant has proved all the material allegations of the bill which were put in issue by the answer, by a clear and satisfactory preponderance of evidence.

RETROSPECTIVE.

The situation and relationship of the parties to this suit had become such before the spring of 1876, that their joining together at that time in the enterprise set out in the bill was but natural, and followed almost as a matter of course.

Though the great bonded indebtedness covering the railroads in question (then fatally crippled as to completion and with land grants in jeopardy), was held in Holland, it was becoming manifest that only enterprise on this side of the ocean would be able to cope with the vast difficulties of the situation.

That the enterprise of acquiring the property, for better or for worse, with all the contingencies and doubts pertaining to its future, and subject to the vast indebtedness necessarily to continue for many years against it, in some form or other, should have been suggested to the minds of Jesse P. Farley, Norman W. Kittson and James J. Hill, and by the latter parties to Donald A. Smith and George Stephen, of Canada, is not strange, but the most natural event in the world.

It seems equally apparent that without the entire combination of the five men mentioned, the enterprise would either never have been undertaken, or, if entered upon, that it would have come to an end far short of success. Each of the five—

Farley, Kittson, Hill, Smith, Stephen—was a necessity to the enterprise; Farley particularly so, as the only practical railroad man in the list, and the one in possession of the property and its reliable data, as well as holding deservedly the absolute and unlimited confidence of the parties interested, particularly of Mr. Kittson, without whom Smith would never have acted, and of the Dutch committee and their agents, John S. Kennedy & Co.

We believe the record discloses the whole story, so far as material to the issues.

J. P. Farley.

Jesse P. Farley, the complainant in this case, was, when he testified, engaged in the manufacturing business at Dubuque, Iowa, being then the president of two large manufacturing concerns located in that city, where Mr. Farley had resided for over fifty years, with the exception of the time he was at St. Paul as receiver of the St. Paul and Pacific railroad and general manager of the first division lines of that company.

From 1837 to 1853, he was a merchant in the retail and wholesale business. His railroad experience commenced with 1853.

The first railroad he was connected with was the Dubuque and Pacific road, organized in 1853. He was elected president of the company, and served until 1861. He was connected with that enterprise from its earliest history until the time of its completion to Sioux City, in 1870. That line was leased to the Illinois Central Railroad Company in 1867, and Mr. Farley continued as superintendent for the Illinois Central, of what was called the "Iowa Division." During this time, in 1863, while connected with the Dubuque and Pacific road, and performing the duties of superintendent and general manager,

Mr. Farley was appointed receiver of the Dubuque and Western road running to Cedar Rapids. That property was sold out and purchased by the bondholders, who reorganized it as the Dubuque and Southwestern, instead of the Dubuque and Western, and Mr. Farley became president of the new company, and continued to manage its property, as president and general manager, until appointed receiver of the St. Paul and Pacific Railroad in Minnesota, in 1873. During that time he finished the road from Springville, in Linn county, to Cedar Rapids, a distance of fourteen miles. (50.)

While superintendent of the Iowa division, by consent of the Illinois Central, Mr. Farley acted as construction agent and general manager of the Cedar Falls and Minnesota Railroad from Cedar Falls to the state line, in Mitchell county for about two years. This Cedar Falls and Minnesota road was a part of the leased lines of the Illinois Central.

While thus actively engaged as a railroad man in Iowa, Mr. Farley was appointed receiver of the St. Paul and Pacific Railroad in Minnesota. The appointment was made the first day of August, 1873, at Judge Dillon's court at Davenport, and Mr. Farley was notified by telegram, the same day the appointment was made.

He was not present at the time the appointment was made but he was notified thereof by John S. Kennedy, or his partner, John S. Barnes.

Mr. Kennedy was connected with the Dubuque and Sioux City road through the house of M. K. Jessup & Co., of New York, of which firm he was a member a good many years, while the Dubuque and Sioux City road was being built. (51.)

At the time the Cedar Falls and Minnesota Railroad was built Mr. Kennedy was president of that company. Mr. J. S. Barnes was his partner.

Mr. Farley's personal acquaintance with Mr. Barnes com-

menced during the time he was building the Cedar Falls and Minnesota road in 1868 and 1869. Mr. Barnes came out several times during those two years to look over matters.

After Mr. Farley's appointment as receiver of the St. Paul and Pacific Railroad in Minnesota, he resigned his positions in Iowa and came to St. Paul with a letter from John S. Kennedy & Co., introducing him to Mr. Otis, who was the attorney for the bondholders of the Minnesota roads.

Mr. Farley's first duty as receiver was to take charge of the property and assets, as far as he could find them, of the St. Paul and Pacific road.

He was notified by the attorney, Mr. Otis, that Mr. George L. Becker had been managing the property, and naturally called upon Mr. Becker to have him show the property and turn it over. (52.)

The reply Mr. Farley received was: "If you can find any "property belonging to the St. Paul and Pacific road you had "better take charge of it." No person ever showed Mr. Farley a book in connection with the organization of the company or the building of the portions then completed. He could hear from various reports that there was a large amount of bonds that had been issued, and that there were fragments of property from East St. Cloud to St. Vincent, a distance of about 300 miles, and from Watab to Brainerd, a distance of about sixty or sixty-one miles. He learned, in the course of his searches for this property, that Mr. Charles Morris had been the chief engineer in the construction, and was the only man willing to give any information about it, or show where and what it was.

Some three or four weeks later, Mr. John Carp, the agent of the Dutch committee of bondholders of Holland, came to St. Paul. After consulting with Mr. Carp, three or four days after his arrival, Mr. Farley went over the property from be-

ginning to end. Mr. Carp went with him as far as Breckenridge. That was the shortest way to get to the property. Breckenridge was the terminus of the first division of the St. Paul and Pacific Railroad, and 217 miles from St. Paul.

Mr. Morris and Mr. Farley left Mr. Carp at Breckenridge and proceeded by stage fifty miles, to Glyndon. There they hired a hand-car of the Northern Pacific road, with a sufficient number of men to work it, and proceeded to the end of the iron, about twenty-eight miles north of Crookston. (53-4.)

Besides this there was twelve miles of iron laid south of Glyndon.

The road was in such condition that a locomotive or train could not be run over it at all. They returned to Glyndon on the same hand-car. From there they took a train on the Northern Pacific road to Brainerd, where they hired a two-horse rig and came down the Brainerd line—followed the grading all the way down, as nearly as they could drive to it, to Watab, the terminus.

Iron had been laid from Brainerd this way about six miles; and from that point to Watab the grading had been completed. They found, on the line of the road, some three or four hundred thousand ties, a great deal of bridge material at different points ready to put in shape, and a great deal of bridge lumber hauled out to different points. Mr. Farley returned to St. Paul with Mr. Morris; but also on this same trip went over the thirty-six miles of completed road from East St. Cloud to Melrose. That was a portion of the road at that time being operated by the First Division Company, though part of the receivership lines. Mr. Farley with Mr. Morris' assistance, made for Mr. Carp a schedule of the property, grading, iron, etc.

Much of this material supposed to belong to the company (all this bridge timber and several hundred tons of iron at

Glyndon) was claimed by Col. Crooks or De Graff & Co., the contractors (54).

Mr. Carp, the bondholders' agent, got all the information he desired and went away again to Holland, leaving Mr. Farley to contend with the situation as he found it.

Mr. Farley, employed cars of the Northern Pacific road, put portions of the lines in working order, and applied to the government for the lands due under the land grants. (55–6.) Complications arose as to the land titles, and conflicts with the contractors also ensued. It was as late as 1874 before the lands for the completed portions were certified under the grants.

The defendant, Norman W. Kittson, never gave his testimony in this case. Both Mr. Kittson and Mr. Farley were well along in years when they first met, and at the time Mr. Farley testified, in October, 1887, he was seventy-four years old; consequently he is now eighty years of age. Mr. Kittson died May 10, 1888 (some six months after Mr. Farley testified), and was then in his seventy-fourth year (706, 705, C. Q. 60), and would now be seventy-nine years of age, if living.

James J. Hill.

When Mr. Hill came to St. Paul from Canada, in 1856, in his eighteenth year, he first engaged as a check-clerk for Brunson, Lewis & White, forwarding and commission men on the levee at St. Paul, dealing largely with business that came by Mississippi river steamboats. (699, 700.) In 1857 Mr. Farley met Mr. Hill at the levee in St. Paul, when there were no railroads in St. Paul, and when Mr. Farley was the president of the Dubuque, Wisconsin and Minnesota Packet Company, a daily steamboat line upon the Mississippi river, afterwards merged in the "Old Galena Packet Company."

Mr. Hill's employers, in 1856–7, were the agents at St. Paul

of Mr. Farley's Packet Company, and Mr. Farley met Mr. Hill while he was in that employment. On cross-examination, Mr. Farley said there were circumstances connected with that acquaintance with Mr. Hill which would make him recollect it on its being brought to his attention afterwards—that Mr. Hill always came aboard the steamboat and got his dinner when it was convenient with them—made himself famliar. (136, C. Q. 88.)

Long afterwards, in 1873, as Mr. Farley testified, Mr. Hill spoke to him at the hotel in St. Paul, and recalled to him the earlier meeting above referred to; and that Mr. Hill's personal appearance had become so changed in the meantime that until he told who he was Mr. Farley did not recognize him. (118 Q. 346; 136 C. Q., 88.)

Mr. Farley, further testified (139 C. Q., 109):

"I never would have known Mr. Hill again if he hadn't renewed his acquaintance with me in 1873. He called my attention to the fact of being a check-clerk there, and in our business. Then I recollected him as soon as he told me who he was."

Mr. Hill testified that he continued in the same character of employment until 1865, when he became agent for one of the packet lines on the Mississippi river. (704).

Norman W. Kittson.

In 1865, (and for many years before) Mr. Kittson was agent at St. Paul, of the Hudson Bay company, and, about 1862, commenced to run a steamboat on the Red river of the north, transporting merchandise to the Red River settlement (705). He was one of the earliest white settlers in the State of Minnesota. In early days (about 1858), he was mayor of St. Paul; and Mr. Hill was city-wharf master about that time (708).

The following short sketch of the life of Mr. Kittson, from the History of Ramsey county and the city of St. Paul, including the explorers and pioneers of Minnesota, written by Rev. Edward D. Neill, and published at Minneapolis in 1881, was, before Mr. Kittson's death, on cross-examination, read to Mr. Hill, who reluctantly admitted that, so far as he knew, the sketch was in the main correct (706–7):

"Norman Wolford Kittson, a native of Sorel, Lower Canada, was born March 5, 1814. He is a grandson of Alexander Henry, the celebrated explorer and traveler, who journeyed through the Lake Superior, Manitoba and Saskatchewan districts as early as 1776, and whose published travels are very scarce and valuable. In May, 1830, being then only sixteen years of age, he engaged as an employe of the American Fur Company, and in that capacity came to the Northwest, and was stationed at the trading post between the Fox and Wisconsin rivers during the years of 1830 and 1832. The last year he was sent to the head waters of the Minnesota, then to the Red Cedar river of Iowa. In 1834 he came to Fort Snelling, where he was engaged in the sutler's department until the fall of 1838, when he returned to Canada and remained until spring, when he began business on his own account, as a fur trader, near what was then called Cold Spring, just above Fort Snelling. He remained at this point until 1843, when he entered the American Fur Company as special partner, having charge of all the business on the head-waters of the Minnesota and along the British line, and during that year made his headquarters at Pembina, and commenced collecting furs and shipping them in Red River carts to Mendota. The same year he purchased of James R. Clewett the tract of land which was laid out in 1851 and known as Kittson's Addition to St. Paul. In 1851, Mr. Kittson was elected a member of the council of the Minnesota legislature from the Pembina district, and re-elected in 1853, and served four sessions, in which he took an active and prominent part. In order to attend these sessions he was compelled to walk on snow shoes, or ride in a dog sled the entire distance (which was about 500 miles), attended with great hardships and exposure. Two of these trips he made on snow-shoes. In 1854, Mr. Kittson entered into partnership with the late William H. Forbes, of St. Paul,

and known as the firm of Forbes and Kittson, engaged in the general Indian trade supply business. The establishment was called the "St. Paul outfit," and was very widely known. That year he came to St. Paul to reside permanently, and the same year he erected what was known as the Sintomine hotel, a large frame structure built near the corner of 6th and John streets, but was burned October 3d, same year. In 1858, he was elected mayor of the city of St. Paul, which ended his public life. The same year the firm of Forbes & Kittson was dissolved. He still continued his Red River trade until 1860, after which he accepted the position of agent for the Hudson Bay Fur Co., and established a line of steamers and barges on the Red river, which grew to be quite a corporation, and was called the Red River Transportation Company, with headquarters at St. Paul, operating several steamers and barges. With one exception, Mr. Kittson is the oldest living settler in the state, and during his time he has witnessed and taken part in changes which fall to the lot of but few men during an ordinary lifetime. Notwithstanding he will soon reach the allotted age of man, he is still as active and strong as many men at one-half the age. He is constantly absorbed in business of no small proportions, and with the advance of years he is handling some extensive enterprises."

In 1862 or 1863 Mr. Kittson was absent, and Mr. Hill looked after his freight and boating business, and learned its routine. (704, 705.) This continued during 1863, 1864 and 1865; and in 1866 Mr. Hill took up the Red River agency for himself of some of the traders other than the Hudson Bay Company. (558, Q. 13.) He followed this in 1870 by starting flat boats and building a small boat on the Red river himself, or by his firm, in competition with Mr. Kittson's line. (711, C. Q. 95.) After one summer's competition, during 1871, the two boating interests were consolidated, and were operated together in 1872, and thereafter. (560, Q. 23, 24.) Mr. Hill's partners were eliminated from the boating interest early in 1873, and Kittson and Hill then formed the Red River Trans-portation Company. (713, C. Q. 109.)

In a small way at first, beginning in 1866 and 1867, on

the building of the First Division road, Hill's firm, being already in the freight business on the Mississippi levee, built a freight warehouse, or addition to the railroad station at St. Paul, and handled both the Mississippi river steamboat freight and the railway freight in the one building. (562, Q. 35.) He handled the freight of the railroad as its agent. (563, Q. 38.) Mr. Hill, with various partners, held this local freight agency of the First Division Company from 1866 to 1867 continually, until Mr. Farley came to St. Paul in 1873.

On Mr. Farley's becoming the General Manager of the First Division Company in 1876, the contract referred to, in which Mr. Hill's firms were interested, was discontinued.

This brings the general history of affairs as between Kittson, Hill and Farley down to the year 1873; and shows that they were thrown together in that year by a combination of circumstances likely to produce peculiarly intimate business relations.

Period of 1873, 1874, 1875.

The correspondence between Mr. Farley, and Kennedy & Co., and Carp, agents of the bondholders, beginning with October 9, 1873, down to October 1, 1874 (Ex., 125, p. 178, 200), deals with the legal complications, land grants, and operation of this line, so far as finished or capable of being put in running order at small expense.

Mr. Kittson and Mr. Farley meet.

On Mr. Farley's coming to St. Paul, as receiver, he found Norman W. Kittson, the manager of the Red River Transportation Company, running a line of steamboats on the Red river, along which river part of the extension lines were built and the remainder projected.

James J. Hill was then a stockholder in the transportation company, and his firm of Hill, Griggs & Company, held a contract with the First Division Railroad Company (then built into St. Paul, but not included in the receivership) for handling the local freight at the station at St. Paul.

The receivership lines were in an unfinished condition.

A running arrangement between the steamboat company and the receivership lines was effected as early as September 15, 1874. (Rec., 200.)

In a letter by Mr. Farley to Kennedy & Company, dated October 1, 1874, the following passage occurs:

"GENTLEMEN: On the 15th of last month (September), we succeeded in completing arrangements with the 'Red River Transportation Company,' by which their steamboats, that have formerly run on the Red river between Moorhead and Fort Geary, now run from Crookston to Fort Geary, giving us the transportation, over sixty-five (65) miles of road between Glyndon and Crookston, of nearly all the freight and passengers passing through the states to and from the province of Manitoba. This part of the road is now in very good shape, and, while we have to do the business at a low rate, we hope, by economy, to show some net earnings. As we have to hire the locomotive and cars from the Northern Pacific Company, our expenses will be greater than if they were owned by this company. Will inform you monthly as to the earnings and expenses. * * * "

This intimate business relationship, begun with Mr. Kittson in the autumn of 1874, was followed in the spring of 1875 by a discussion of the project of building the cut-off road from Breckenridge to Glyndon.

Mr. Hill being interested with Mr. Kittson as a stockholder in the steamboat company, it appears they had numerous con-

versations with Mr. Farley and Mr. Fisher, his assistant, about that project.

The details of the plans then under discussion are shown by the letters of April 15th, May 28th, and September 17, 1875 (Rec., 208, 209, 210), and also by the detailed plan made in April, 1875, and the letter of July 17, 1875. (Rec., 1706, 1707.)

In pursuance of the plans at those times under discussion, Mr. Kittson and Mr. Hill signed a bond for $79,000, for Mr. Farley, in an injunction suit to prevent the removal of the De Graff iron, which iron it was proposed to utilize in building the cut-off, as the letters referred to will show. (August 11, 1875; 947.)

On April 15, 1875, Mr. Farley wrote Kennedy & Co., (208):

"We have now on foot the project of connecting the First Division Company's road at Breckenridge with the end of our iron south of Glyndon, a distance of about thirty miles. We have been talking to parties that are able to and possibly willing, under certain conditions to advance a sufficient amount of money, say $15,000, to pay duty on one thousand tons of iron at Duluth, claimed by De Graff & Co.," etc.

Mr. Farley testified:

"The parties there referred to were principally Mr. Kittson, in connection with Mr. Hill. At that time the St. Paul and Pacific was doing business with Mr. Kittson's line of boats at Crookston, and it was found very inconvenient for freight and passengers going from St. Paul via Thompson Junction, to Winnipeg. The traffic was received at Glyndon, and delivered to Mr. Kittson's boats at Crookston; and the proposition was to control that business by a very much shorter route, by the way of Breckenridge, at a very small cost. Mr. Kittson was the principal man in this talk and arrangement to raise the necessary funds to carry out the project. Mr. Hill was an interested party in the steam-boat line, and may have had more or less to say about it; but the principal talk was with Mr. Kittson, because he controlled the steam-boat line." (67.)

On May 28, 1875, Mr. Farley further wrote (209):

"Our friends are still anxious and somewhat sanguine about the feasibility of connecting our Red River line with the First Division company's road from Breckenridge. We are satisfied if this link of twenty-eight or thirty miles was finished, giving us a shorter and more direct line for the business of Manitoba freight and passengers that it would be a good thing." * * *

"During the past two weeks we have been engaged in fixing up our road from Glyndon to Crookston, in view of connecting with the Northern Pacific at Glyndon, and carrying freight and passengers connecting with the steamboat line at Crookston. We hope to control that business over this sixty-five miles of road after the first of next month (June)."

On cross-examination Mr. Farley testified concerning the relations with Mr. Kittson and the building of the "spur-track," as follows:

"In the summer of '75 we did some business with Mr. Kittson's boats, connecting with them at Crookston. The business was increasing so rapidly, and particulary iron for Winnepeg—railroad iron. The water got so low the boats could carry out but a very small tonnage from Crookston. Mr. Kittson proposed to me and told me that if I would furnish the iron and ties and spikes and joints which were laying on the line of road at that time he would pay for the grading, laying of the iron, etc., necessary to build to a point about twelve miles on the Red Lake river below Crookston, stating, as he said, it would save about thirty miles run for his boats and the low water; and, to the best of my recollection, we made that agreement with Mr. Kittson, and at once went to work and graded and laid that iron down to a place which we afterwards called Fisher's Landing, (I think the whole work was completed in two weeks), and did, during the balance of that season, deliver to Mr. Kittson's boats a very large tonnage of iron and other freights—he being able from that point, as I understood it, to carry out on his boats and barges each trip about three hundred tons; and if he had been running to Crookston he would only be able to carry out about one hundred. Mr. Kittson paid for the labor, and afterwards the expenses of keeping the line up." (131, 132.)

Concerning the proposed "cut-off" road, on July 17, 1875, Mr. Farley wrote (1706):

"Since our last communication nothing has transpired here of interest, everything seems to be very quiet. The subject of completing the road from Breckenridge to the terminus of our iron south of Glyndon is being agitated again and parties here are very anxious to have the work completed. We now have responsible parties ready to furnish the money necessary to complete the line, without any aid from us in either iron, ties, or anything else, but when completed they wish us to occupy it, giving some guarantee that it will be used for all time to come as the common thoroughfare from St. Paul to Manitoba, etc. We will be able in a few days to give you substance in detail what they will require on our part. You will remember that we have written you before on this subject—and looking over your reply we find that your views did not differ materially from ours—about making our line down the Red river available, etc. When your Mr. Scott was here the first time, we gave him a memorandum embracing this subject—according to our best recollection he promised to confer with you in New York, since that time we have heard nothing from him on the subject. * * *"

The memorandum referred to in this letter (1707): Mr. Fisher, in his second deposition (after Mr. Hill had testified) identified from the letterpress copy-book, as written for Mr. Scott (as above), between April 20 and 25, 1875. (1656-7.) It is shown in the record.

On September 17, 1875, Mr. Farley wrote (210):

"We are controlling this Manitoba business over our line from Glyndon to Crookston with some prospect of making it remunerative. The water in the Red river is not sufficient to permit the boats to get to Moorhead, a point on the Northern Pacific road, or to Crookston, a former steamboat landing on our line, and for the sake of controlling this traffic until our line is finished to Pembina, which may be two or three years in the future, we have been induced by the Red River Transportation Company, they paying the expense, to put in a spur track from Crookston down the Red Lake River, to a point which can be reached by the boats at all stages of the water, the distance about nine miles. At the time this project was conceived, we expected to be able to use temporarily the iron now lying at Glyndon, but after getting into litigation with De Graff & Co. as to title to the iron, we thought it unsafe to do

so, and have been compelled to take up some of our side-track iron which was of no particular use to the main line at present, and also some of the main line iron north of Crookston, which has not been used for three years. All of said iron will be replaced as soon as it becomes necessary in order to finish our road to Pembina.

We have taken the responsibility of doing this thing in order to create and hold business in the future which will enable the receiver to make this property self-sustaining, and it can be done in no other way."

After Mr. Hill's testimony had been taken, in which he testified the cut-off road was talked of being leased to him and Mr. Kittson (588–90), Mr. Farley was re-examined and denied that any such conversation occurred. (1652.)

As it will be necessary when we come to the testimony of Mr. Hill, to discuss more fully and directly the facts as they occurred, in 1873, 1874 and 1875, in order to expose the false coloring he attempted to give to the events of those years, we shall not now pursue them further.

In the meantime, and until the spring of 1876, the railroad lines, known as the First Division company, continued in the hands of Geo. L. Becker, as president, in the stockholder's interest. The First Division railroad then consisted of a completed line of road from St. Paul to East St. Cloud and Sauk Rapids, which was called a branch line. They had a completed line of road from East Minneapolis to Breckenridge, 207 miles, or about that. It was all in a dilapidated condition; hardly possible to get trains over the line, and had about twenty-five locomotives, and a very light equipment of freight cars and passenger coaches. (68, Q. 71.)

While matters stood in this shape, in March 1876, the management of the First Division property changed from the hands of Mr. Becker, president, and the Litchfields (stockholders), to a new board of directors, and to Mr. Barnes, as president. The new board, by resolution passed February

16, 1876, appointed Mr. Farley the general manager and superintendent of the First Division property. (See the letters from Mr. Barnes as president, and the resolution, dated February 17, 18, 16, 1876, 237–9.)

Mr. Barnes visited St. Paul, soon after the possession of the First Division property so changed hands. (69, Q. 74.)

Mr. Farley continued as manager under the authority stated until October 9th or 10th, 1876, when the trustees of the bondholders took possession under the powers in the trust deeds, and appointed Mr. Farley their general manager of the same First Division property.

Mr. Farley continued as such general manager until all the lines of both systems were sold under foreclosure decrees at a later date, in the spring of 1879.

The agreement on which this suit is based was entered into in the spring of 1876, between Norman W. Kittson, James J. Hill and Jesse P. Farley, as principals.

At the interviews when the agreement was explicitly made, William H. Fisher, Mr. Farley's then assistant, was present, and he and Mr. Farley have testified fully in regard thereto. At the time Mr. Fisher testified he was the president and general superintendent of the St. Paul and Duluth Railroad Company, and had been connected with that company for about four years. (331–2.)

Mr. Fisher had taken part in many of the interviews between Mr. Kittson and Mr. Farley, in the years 1874 and 1875, had often met Mr. Hill about the same matters, and had written, for Mr. Farley to sign, a large number of the letters giving the details of the matters which had so arisen.

Complainant's Depositions.

We will now state the testimony given by Mr. Farley, in his own behalf, as to the agreement between himself, Mr. Kittson, and Mr. Hill:

Mr. Farley testified (71):

"The first conversation that ever occurred on that subject, Mr. Hill came into my office, and told me that he had some conversation with Mr. Fisher about the price of the St. Paul & Pacific and First Division of the St. Paul & Pacific bonds. Mr. Fisher, through me, was familiar with the quantity of bonds on each piece of property, and about their rated value in Holland. There was none in this country, to my knowledge, but through me he became familiar with the rated value of those bonds in Holland, of each kind of bonds. There was five different issues, may be six, altogether. He come to me, and told me what he had learned through Mr. Fisher as to the number of bonds outstanding, and about their rated value in Holland; and Mr. Hill thought there would be a big speculation in buying those bonds. I agreed with Mr. Hill as to the speculation—it would be a big one if the money could be raised to do it. Mr. Hill continued this kind of talk with me from day to day, and as I knew Mr. Hill to be a man that was very fond of talking, I continued to hear what he had to say. I think it was the second talk I had with Mr. Hill that he suggested the idea (and very emphatically too), that he believed Mr. Kittson had influence enough with one Donald A. Smith, of Montreal, Canada, to raise that amount of money, and, if he was correct in that conclusion, he was in favor of buying those bonds in view of inheriting the property at the foreclosure sale, then being in the courts. From time to time, running through a good many weeks, Mr. Hill and Mr. Fisher continued to talk to me about this matter of purchasing the bonds. I agreed with them that it was a good thing, but I did not see where the money could be raised. Finally Mr. Fisher informed me that Mr. Kittson would like to have an interview with me on that subject, and Mr. Fisher informed me that he had appointed a time and place where Mr. Hill and Mr. Kittson would meet me. According to appointment, I was in my office at the time appointed for this interview. Mr. Fisher was with me at the office at the time.

Mr. Kittson and Mr. Hill came according to appointment with Mr. Fisher. Mr. Hill and Mr. Kittson came into the office, and after the compliments of the day, Mr. Fisher being present with me, Mr. Kittson broached the subject of the nature of their visit, by saying that he had had a good deal of talk with Mr. Fisher and with Jim Hill (Jim, as he called him), about the propriety of buying these bonds in view of inheriting the property at the foreclosure sales. I replied to Mr. Kittson, what was the fact, that Mr. Hill and Mr. Fisher had been having the same kind of talk with me, and that I agreed with him that it was a good project and enterprise to go into if the money could be raised. I doubted the matter of raising the money. Mr. Kittson then and there, in the presence of Mr. Hill, Mr. Fisher and myself, said that he had been thinking about the subject, and either had seen Mr. Smith or corresponded with him, I don't know which; but he was satisfied that he could raise the money through Mr. Donald A. Smith, of the Montreal Bank. Mr. Kittson being a man that was entitled to a great deal of credit in all that he said or done, gave me great confidence that he was correct; that the money could be raised; up to that time I doubted it. But said that he had both said to Mr. Hill and Mr. Fisher, in former interviews with them, that he would have nothing to do with the purchase of these bonds unless I would join them; going on to state in the same connection that "I know nothing about a railroad; don't want to know. Jim Hill knows nothing about the management of a railroad, and it would be folly for a man to go into an enterprise of this kind, even if they were successful, without some person with them with railroad ability and experience to manage the property." My reply to Mr. Kittson was that I had no ability to raise any large sum of money, but if he could raise it, and was satisfied of that fact, I was willing to join them. It was then and there agreed—

The conversation mostly was between Mr. Kittson and myself, Mr. Hill sitting there, and hearing everything and consenting to it, as far as I know, and also Mr. Fisher.

After my consenting to go in with them, there was a great deal said about the future management of the property. It was to be under my control, the management; and, on account of my reputation that had been established here in the management of the property, they both agreed that I should retain the management of it. Mr. Hill had a great deal to say

about how this interest should be divided. He gave his reasons by saying the control should be kept in St. Paul; and that Mr. Kittson was to have one-fifth, I was to have one-fifth, Mr. Hill was to have one-fifth, and the two-fifths were left to be divided or given to the parties, Mr. Donald A. Smith and his friends, who were going to raise the money. I insisted that that was a matter that would have to be considered hereafter. I thought it was a good plan to interest some prominent citizens of St. Paul in this matter, on account of the future influence in the legislature, and otherwise, for the benefit of the property. Mr. Kittson didn't say anything about that. He didn't say whether he favored my view or Mr. Hill's. He seemed to be indifferent on that subject, and it was left about in that way—that three-fifths should be controlled in St. Paul, as Mr. Hill had suggested, one-fifth to Mr. Kittson, and one to Mr. Hill, and one to me.

At that interview that was all that was said about the division of the interests. It was left with that understanding. There was a great deal said by Mr. Kittson and Mr. Hill both, about the future management of the property, and its prospective value, and Mr. Hill figured up the number of acres of land that was then owned by the company, and the number of miles of finished railroad, number of locomotives, number of cars, terminal facilities in St. Paul and Minneapolis. It was there understood between us three—

There was a good deal said, by myself principally, in the presence of Mr. Hill and Mr. Kittson, about the reorganization of this property when it was sold under foreclosure proceedings; that a new company would be organized, and a sufficient number of bonds issued—mortgages placed upon the property and bonds issued—which would sell at par, and, according to our calculations, worth from four to five millions of dollars. With a mortgage of all this property behind it, it would make the bonds very good, and would sell at par, and that our profits would consist in owning all the stock, by Mr. Kittson and Mr. Hill's own admissions—

Mr. Kittson and Mr. Hill had no opinions about it, because they knew nothing about it. It was all new to them, about the organization and issuing bonds, something they didn't know anything about. They may understand it now, but they didn't then, sure. This kind of a general talk between us lasted possibly two hours. Mr. Kittson, Mr. Hill, Mr. Fisher, and myself were present all the time. After this

interview, Mr. Hill saw me daily almost, and had a great deal to say about the future of this enterprise, and a general running talk between him and I lasted for some,—possible, weeks. I didn't see Mr. Kittson as often as I saw Mr. Hill, and there was not as much said between him and I as there was between Mr. Hill and I. Mr. Hill came into my office on one of his daily visits, and said to me that he had been looking around with a view of getting a man to go to Holland—Amsterdam—to stay there and purchase these bonds upon the market as they might be offered. I said to Mr. Hill that that would be very imprudent. I think at this time Mr. Hill was aware, too, that the most of these bonds were held by a Dutch committee, and it would be very imprudent to send a man there, because if it was known that there was an American purchaser the price of the bonds would go up, and that that was not the class of bonds we wanted to buy; and that the Dutch committee, upon my information and knowledge, held a very large majority of these bonds. The Dutch committee of bondholders, as it was known, held and had under their control a very large majority of each class of these bonds; and they were the bonds we wanted to buy to inherit the property—could do it in no other way. At the foreclosure sales the large majority of the bondholders would be the purchasers. A Mr. John Carp, who had been in America in 1873, soon after my appointment, was expected to arrive in St. Paul very soon, and through him I could ascertain the probabilities of buying this holding of the Dutch committee, in the hands of the Dutch committee. Mr. Hill agreed with me that that was best—to await till Mr. Carp arrived. Some weeks later than this Mr. Carp did arrive—the month of November, I think it was, 1876. Mr. Carp spent a great deal of his time with me, as the representative here of the property.

Mr. Carp spent his evenings with me generally.

I asked Mr. Carp in the course of our conversation, as he informed me that the Dutchmen would raise no money to finish the road until the foreclosure suits were determined, if the Dutch committee would sell the bonds that were in their possession. His reply was that they would be very willing to do so, if they could get a price that would be satisfactory. After talking over the prices of the bonds, and one thing and another, he informed me that the bonds could not be purchased at the price that they were usually sold there upon the market; but he believed that, if the committee could get a price that would

be satisfactory, they would be very willing to sell. I told him then that there was parties in St. Paul here that would buy the entire holdings of the Dutch committee on terms that would be satisfactory, if they could buy the bonds on satisfactory terms. He expressed himself as very much surprised to hear me say that such a syndicate could be raised in St. Paul. But his way of expressing it was: "Can so much money be raised in St. Paul to purchase these bonds?" I informed him that I thought it could be, and asked him if he would appoint a time and place where he would meet the parties that I had reference to. I think I gave him the names that evening of the men I had reference to—Mr. Kittson and Mr. Hill. Mr. Carp at that time was boarding at the Metropolitan Hotel, as well as myself, and he mentioned the next day in his room, at 2 o'clock, he would meet my friends who wished to purchase these bonds. In the forenoon of that day I notified Mr. Kittson and Mr. Hill that I had had such an interview with Mr. Carp, and that he would meet them at his rooms in the Metropolitan Hotel at 2 o'clock that day. They agreed to be on hand at the time appointed—2 o'clock that day. I took Mr. Kittson and Mr. Hill to Mr. Carp's room, and introduced them to Mr. Carp as being the parties I had mentioned to him the night before who would buy these bonds.

After I introduced those two gentlemen I stayed there, and we talked about this matter—the purchase of the bonds; probably I sat there to talk with them about half an hour, and left Mr. Kittson and Mr. Hill in Mr. Carp's room, and returned to my business. Before I left Mr. Carp repeated about the same, referring to my conversation with him the evening before. He repeated about the same that he had to me the evening before. He thought the committee would be very willing to sell the bonds if they could obtain a price that would be satisfactory, and told them—as he told me the evening before—before I left the room, that he didn't believe the bonds could be purchased at the usual rates that they were sold on the markets in Amsterdam. They would want a higher price than that, giving the reasons that those quotations and sales were generally made by small bondholders, and by men who were poor, and had to have the proceeds of the bonds.

He said a good deal about his not being authorized to make any price for the sale of the bonds, but would mention a price that he felt the committee would sell for.

After this conversation ended I left the room, and returned

to my business. In less than an hour, however, after I left the room and went to my office, Mr. Hill came down there and reported to me that their interview was very satisfactory with Mr. Carp. and he thought the outlook was favorable for the purchase of the bonds in the hands of the Dutch committee.

I won't be positive that he did that day, but a few days later than that, if not at that same interview, he showed me some of his own figuring of the prices that Mr. Carp thought the bonds could be bought for.

During Mr. Carp's stay here after that, it was a daily occurrence to talk to me about the ability of these men to buy the bonds, and as often as he mentioned the subject I assured him, having a great deal of confidence in Mr. Kittson, that I thought they meant business, and could carry out all they agreed to; however, he was very skeptical on this subject himself. Mr. Carp remained here that trip. He came for a general overlooking of everything that was connected with the First Division and the St. Paul and Pacific, and was with me daily and almost hourly during the business hours of the day.

He was very diligent and industrious during his stay.

He examined our books and accounts, and made a thorough examination to satisfy himself, at least, in regard to everything connected with the management of the property.

There is one little circumstance connected with the first interview I had with Mr. Kittson and Mr. Hill that I forgot to mention before. It may be important or unimportant, I don't know.

In our first interview there, where we agreed to go into the matter of purchasing the bonds, it was considered, by Mr. Kittson particularly. Mr. Kittson said: "Mr. Farley, you are receiver under the court of one of these lines of road, and general manager of the other line under the trustees in possession, and, in order to success in this enterprise, it would be best for you not to be known in it, for here are the Litchfields and Mr. Bigelow and Mr. Becker fighting for the possession of the property,"—as he called it, "fighting." It was in the law business for the possession of the property. "If it was known by these parties that you are interested in the purchase of the bonds these parties would go to the court and ask for your removal, and in that event I wouldn't give a dollar for the whole thing. I wouldn't invest a dollar in the whole thing." Upon a moment's reflection I thought Mr. Kittson was right about it, and

then and there, with Mr. Hill, Mr. Fisher and myself, it was sacredly agreed—

Mr. Kittson and myself agreed that that was the best plan to pursue, and Mr. Fisher, as a matter of course, had nothing to do with it, and Mr. Hill didn't object to it—thought may be it was a good thing. That was a very sacred point with Mr. Kittson clear through the whole transaction. He looked at it as very important.

It was agreed on that subject that I was to give my entire attention to the management of the property, and to furnish them with all the advice and knowledge and experience I had on the subject, and they were to go forward, Mr. Kittson and Mr. Hill, with their associates whom they might interest in Montreal, and carry this enterprise to a completion in the best possible way they could. So far as I know, that under-standing between Mr. Kittson and myself, Mr. Hill consenting, was faithfully carried out until about the final completion of the purchase of the bonds of the Dutch committee.

On my part this thing was faithfully carried out.

These conversations, to the best of my recollection, commenced in the month of August, 1876, and continued into the month of September of the same year, 1876. At the time and place referred to in my deposition of yesterday, when Messrs. Hill, Kittson, Fisher and myself were present, it was there very plainly talked of between Mr. Hill, Mr. Kittson and myself, and particularly Mr. Kittson. Mr. Kittson said that he believed he could control the amount of money necessary through Mr. Donald A. Smith and his associates — Stephens — by giving to them a two-fifths interest in the purchase of the bonds and property when inherited through the sale of the mortgages being foreclosed, by this means leaving three-fifths to be owned and controlled by himself, Mr. Kittson, Mr. Hill and J. P. Farley (myself), thereby holding the balance of power in Minnesota; but under all circumstances the interest between Mr. Hill, Mr. Kittson and myself was to be equal.

The conversation on this subject of this enterprise of ours to purchase the bonds continued during that year and the following year, until the thing was consummated. It was a daily occurrence almost, when Mr. Hill was in the city, to call upon me in the natural course of his business, and this question always came up, and Hill most every day had something new to say on the subject. So far as Mr. Kittson was concerned, he was a man that I didn't see as often. (71-9.)

The cross-examination of Mr. Farley began with the subject of the various lines of railroad and their situation (122); dealt with the issues of bonds thereon (125, C. Q. 21); Mr. Farley's sources of early information (127, C. Q. 33); the litigation under the First division mortgages (128, C. Q. 36); affidavits in those cases (C. Q. 38); Mr. Farley's various business interests in Iowa (130, C. Q. 49); early work on the St. Vincent extension (131); business with Mr. Kittson's boats (132); the cut-off road (133); the first meeting of Mr. Farley and Mr. Kittson and with Mr. Hill in 1857 (135); a long cross-examination as to Mr. Farley's steamboating to St. Paul, and his memory of James J. Hill as a check clerk (136-9); Hill's freight contract (139-41); the relations of Becker and Farley (142); foreign bondholdings and value of bonds (143-4) sales in St. Paul; Mr. Farley's learning the values from Upham, cashier (145); schedules of bonds in the foreclosure suits (147); the value of Mr. Farley's services to the enterprise of buying the bonds (148); who originated the scheme (149); deposition in a bondholder's suit (149); and Mr. Farley's salary (152-3); the details of the correspondence with Carp by Kittson and Hill at a later date (in 1877), and Mr. Farley's knowledge of that correspondence (153-4; 158-61); showing Mr. Farley's intimate knowledge of the course of the negotiation from the beginning to its close.

Later transactions in 1878 and 1879 were inquired of (161–8); also some private purchasers of bonds by Mr. Farley through John Carp (169–176).

That concluded the cross-examination of Mr. Farley. Only two re-direct questions were asked of Mr. Farley, and his deposition in his own behalf was closed October 26, 1887. (176.)

Mr. Farley was not cross-examined at all as to the date in 1876 when he, Mr. Kittson, Mr. Hill and Mr. Fisher held the main interviews and entered into the agreement to purchase the railroad bonds.

Mr. Farley—Witness for Defendants.

Mr. Farley was the first witness in this case. (47–9.) After all the complainants' evidence was in, and the defendants' evidence nearly done; after Mr. Hill had testified, after Mr. Kittson's death, after the depositions of Smith and Steven had been taken at Montreal, and that of Mr. Kennedy in Berne, Switzerland, the defendants called Mr. Farley as their own witness (1349).

Prior to defendants' calling Mr. Farley as a witness, every possible effort had been made in Mr. Farley's behalf to procure from Kennedy and his clerk all the letters Mr. Farley had written to Kennedy and Barnes, but those letters had been withheld and refused. (987–8, 1,622–3, 1,638–9.)

It will now be seen those letters were placed in the hands of defendants' counsel, and one or two of them, at least, attempted to be used as a snare to entrap Mr. Farley into a false position on the mere point as to the *precise date* of his entering into the agreement with Mr. Kittson and Mr. Hill.

Mr. Farley as defendant's witness, stated he had been concerned in no prior project to purchase the bonds. His conversations with Mr. Barnes were asked for. His attention was called to letters already introduced in his behalf, written by Mr. Barnes to him, dated June 9, 19, and December 18, 1876. (1350-3. See Exs. 88, 89, 108, pp. 252, 253, 266.) The particular passages in those letters were as follows:

"June 9, 1876: * * * I have constantly in mind my conversations with Mr. Kittson and Mr. Hill, and have had much talk with Mr. Kennedy about it. Matters are so complicated that at this time we do not see a clear way to the desired object, but as matters progress we hope to do so—when the time comes and the way seems at all clear I will confer with you regarding it—* * *"

June 19, 1876: * * * "I have much to say to you re-

garding matters that we have talked of with our St. Paul friends, Mr. Kitchen and Mr. Hill—but shall defer it until I see you. Things are working in the right direction for what we both want, whether there are insurmountable obstacles or not remains to be seen."

December 18, 1876. * * * "I hope our friends Kittson and Hill have seen Mr. Carp and have made him understand what their plans and purposes have been. For my part I never could see how those plans or purposes could be brought to any practical shape, and have thought that I didn't fully understand what they wanted to do exactly. I could always see that the completion of the extensions to St. Vincent would make either a strong competition, during the open months, with the Red River steamboats—and that the boats would suffer greatly, hence that Mr. Kittson's friends would find their account in exercising a control over the St. Vincent Extension. But beyond this, I have never seen my way in any conversation I have had either with Hill or Kittson. * * *"

Mr. Farley stated that those passages, so far as he remembered, referred to the already proposed building by Kittson and Hill of the cut-off road. (1351-4.)

Counsel for defendants then proceeded as follows:

"Q. 24. I observe that this letter of June 9th—complainant's exhibit 87—appears to be written in answer to a letter of your own, of June 3d. Have you a copy of that letter of June 3, 1876?

A. I cannot state. The letter-books, excepting one missing book, are here before the notary in the former testimony.

Q. 25. Have you any present recollection of what you wrote in that letter of June 3, 1876?

A. I have not, sir; only from the answer, I judge it was about Bishop Ireland's trouble."

No copy of that letter to Mr. Barnes had been kept by Mr. Farley.

The original letter, however, was then produced by defendant's counsel, to whom it had been turned over by John S. Kennedy.

It reads as follows:

"ST. PAUL, June 3, 1876.

J. S. Barnes, Esq.

Major Thomson has spoken to me once or twice about refunding to Bishop Ireland the amount he paid for one-fourth section land for town site near DeGraff. Shall I do it?

N. W. Kittson is getting anxious about the big operation of getting control of 1st Div., also extension lines.

He can get the money. What do you think can be done? You have his proposition in your memory. I would again say to you, I think there is a big thing in main line 3 and 6 million bonds, at their present selling price.

Yours, etc.,

J. P. FARLEY."

Another letter by Mr. Farley to Mr. Barnes, produced by defendant's counsel at the same session while Mr. Farley was defendant's witness (1492) is as follows:

"ST. PAUL, Aug. 23d, 1876.

J. S. Barnes, Esqr.

I leave town for a few days. I read your letter 17th to friend Kittson, he feels somewhat disappointed. The old gentleman has great confidence in the future of this property, if it could be obtained for the present selling price of the bonds. His friends, who is expected to furnish the money has unlimited control of Canadian politics. It might become a Canada project, but that would be a matter of no moment to you or me, if we could make some money.

Yours, etc.,

J. P. FARLEY."

On taking the deposition of Mr. Kennedy's former clerk, Mr. Nichols, at New York, just before Mr. Kennedy left for Switzerland, a telegram from Mr. Kittson to Mr. Barnes, and a letter press copy of Mr. Barnes' reply thereto, were introduced, as follows (992):

Dated St. Paul 16, 1876.

Received at Western Union Building, Broadway and Dey St., Aug. 16.

To Jno. S. Barnes, care J. S. Kennedy & Co., N. Y.

Will the bondholders' committee make an offer fixing the

prices of each of the different classes of bonds controlled by them upon which they will sell out entirely & let foreclosure be made here.

N. W. KITTSON.

Endorsed: N. W. Kittson, Aug. 16th, 1876.

Aug. 17th, '6.

N. W. Kittson, St. Paul, Minn.:

Have written Farley on the subject to day.

J. S. BARNES.

(Rec., 957.)

Mr. Farley was not able to produce the letter of Mr. Barnes to him of August 17, 1876 (1,421–3); and defendant's counsel stated Mr. Barnes refused to allow it to be copied or seen. (1,693.)

While Mr. Farley was thus on the stand as defendants' witness, counsel proceeded to introduce the letters of June 3 and August 23, 1876, and, without allowing the witness to read them, to again go over the question as to what the series of letters of 1876, thus placed together for the first time, referred to. Mr. Farley, it must be remembered, was a very old man at the time of testifying. He admitted at once that the letters were in his own handwriting. (1,357, Q. 36; 1,359, Q. 45.) He of course could not explain them, together with the replies he had received, as being applicable alone to the "cut-off" project. (1,357–9.) He said frankly that he could not explain them as connected with the "cut-off." (1,358, Q. 43.) Passages were attempted to be read to the witness without showing him the whole letter (1,359, Q. 47), under protest by Mr. Farley's counsel.

Mr. Farley simply said he had no explanation to make of the last of the two above letters (1360, Q. 48); and further stated that he did not then recollect of conversing with Barnes when he was in St. Paul in the spring of 1876 about the plan to buy the bonds. (1362, Q. 58.) At the next day's taking of testimony, Mr. Farley, while still defendants' witness, was asked

as to a deposition by him in the Sahlgaard case (1363), referring to his agreement with Kittson and Hill; and thereupon the following remarkable scene occurred (1364-5):

George B. Young, defendant's counsel, was examining the complainant, as his own witness, and then and there acting as counsel for the defendants, James J. Hill, the Manitoba Railroad Company and the Kittson estate.

61 Q. In your testimony yesterday in answer to question 56, referring to your letter of August 23, 1876, to Mr. Barnes, you say: "This letter no doubt was written after that interview with Mr. Hill and Mr. Kittson at my office, but what induced the particular object of writing that, I do not know; it was certainly after the syndicate was formed at the office there, that has been mentioned." Refreshing your recollection by the testimony you gave in your second deposition in the Sahlgaard case and the testimony which you gave in your first deposition in the Sahlgaard case and the Stricker case, to which your attention was called in your cross-examination last autumn; what is now your best recollection as to the date of your interview with Mr. Hill, Mr. Kittson and Mr. Fisher in your office, when as you have stated, a combination for the purchase of these bonds was formed, if such interview or such combination ever took place?

A. Will you let me see those two letters, Judge, if it is convenient?

62 Q. You mean one of June—

A. I mean both of them, sir.

63 Q. The examiner has the one of August 23d; the examiner will please hand me the letter of August 23d. (The witness is handed the letter of June 3, 1876, Exhibit 139, and the letter of August 23, 1876, Exhibit 140, being the two original letters.)

A. These letters were written by me, I have no doubt; of neither of them I ever kept a copy; and I have now to say that I must have been mistaken in my former deposition, when I see those letters, as to the time when this interview took place; and if I am wrong in that, I am not too small nor too great to acknowledge the error.

As I said before, I do not wish to state an untruth in this matter. I am satisfied on reading this letter of June 3d, that that interview must have taken place very much earlier than

I have fixed it in my former deposition. I have no recollection of talking with Mr. Kittson personally, although a good deal had been said previously by Mr. Hill and Mr. Fisher; I have no recollection of talking with Mr. Kittson personally about the bonds or about the purchase of this property, which had been said by Mr. Hill and Mr. Fisher, reporting to me what Mr. Kittson said, etc. But I have no recollection of talking with Mr. Kittson about these bonds until that interview.

64 Q. And what is your best recollection now as to the date of that interview?

A. Well, sir; it must have been previous to the 3d day of June, I judge, from this letter; that is all the evidence I have of it.

65 Q. How long previous to the 3d day of June?

A. I could not tell you, sir.

As to the expression used by Mr. Farley in his former deposition in this case, that Mr. Kittson mentioned his being manager for the trustees in possession, Mr. Farley said:

"It would be a very easy matter for me to make a mistake, because I occupied the same position under the management then and also under the trustees, and that trustees word 'In possession' got to be so pat,—so commonly used—that I might have mentioned it without proper reflection; I occupied the same position under both administrations.

"I have not read the original letters until this morning. You will recollect, Judge Young, in showing one of these letters yesterday you were very particular to show me the address and my name attached to it, holding the paper in this way (indicating.) I have not read the original until this morning. My attention has been called to the fact by my attorneys, sir, that there must have been some error in my original deposition."

Then followed a long examination of the witness with the purpose of breaking down his correction thus made, of his former evidence on the mere matter of the date. Mr. Farley's position on the record, after his explanation of his error in the date was made, remained absolutely unshaken. He said:

Refreshing my memory, sir, from these letters of mine, and particularly the one of the 3d of June, I am satisfied that Mr.

Fisher as well as myself, has got that date entirely later than it occurred.

Q. 76. Will you please state how the letter of the 3d of June aided you in fixing the date of the interview when the combination was made, and also what aid the letter of August 23d gives you in fixing the date of the combination at a time prior to the 3d day of June, 1876?

A. This letter indicates very clearly that some talk had been indulged in between Mr. Kittson and myself previous to this date; and I am very well satisfied in my own mind that there was never any talk between him and me personally until that syndicate was formed. I have no recollection of talking with Mr. Kittson until the date that syndicate was formed to purchase the bonds—between Mr. Kittson, Mr. Hill and myself.

Q. 77. What portion of the letter of June 3d do you think indicates that you had had a talk with Mr. Kittson about these bonds?

A. Well, it is this lower part, Judge, "N. W. Kittson is getting anxious about the big operation of getting control of the first division, also extension lines. He can get the money." Well, there is another thing; up to the time of that interview I never had any confidence that the money could be raised—until we had that interview. "What do you think can be done? You have his proposition in your memory." Now, there must have been some talk about it. "I would again say to you, I think there is a big thing in main line 3 and 6 million bonds at their present selling prices." I am satisfied now that there had been—that the syndicate had been formed at that time. (1,368.)

To a very long question in this same line, Mr. Farley replied (1369-70):

"A. Judge Young, when that letter of June 3d, 1873, was written, I was then a man sixty-three years old. I took no copy of it. In your springing it upon me yesterday—I am now seventy-five—my mind is very inactive. My memory is rather treacherous, and your springing it upon me yesterday, as you did, showing me the address of the letter and the signature, it is a matter of surprise, and I did not know what to say. Upon reflection and consultation and getting the meaning of it, and all about it, I can see clearly, you know, that it means just what the letter says, and I must have been mistaken as to the

date when that syndicate was formed. I am not very used to being catechised by sharp attorneys.

Q. 79. Mr. Farley, at the time that I read to you yesterday the passages quoted from this letter, being the whole letter of June 3d, 1876, did I not show you the letter and did you not have it before you wide open?

A. The letter of June 3d, I did not read, Judge. You handed me the other and I read a portion of it and I saw you watching me very closely. My impression was that you was anxious to get it back again and I throwed it back on the table. I read about half of it.

Q. 80. I read the whole of it to you, did I not?

A. All of the June 3d letter?

Q. 81. Yes, sir.

A. I think it is very likely you did, sir.

Q. 82. And did not the stenographer read to you my question embodying the quotations from that letter and before you answered it?

A. I think he did, sir, but as I said before, my mind is inactive and I did not comprehend it as I do when I come to think the matter over."

Defendant's counsel, seeing that his effort to entrap Mr. Farley had failed, and that he had supplied to the complainant two very valuable letters, which, taken with those already in evidence, corroborated and strengthened the complainants' case to a remarkable degree, labored long and hard to break the force of the blow he had brought upon himself and his clients' case. But it was all of no avail. The worst had been done. An error of date had been exposed and promptly corrected. So corrected, complainants' case stood invulnerable. (See the questions and answers, 83 to 208, 1,370–97).

" As to the fixing of the date,—I do not know any reason, sir, only that I must have been mistaken in the date on account of this continued talk about it from early in 1876 until 1878. Every day when Mr. Hill and myself was in the city there was something, more or less, said about it." (1,376.)

And further on he said:

" I can't give the date, but it was that summer of 1876, as I recollect it. You will bear in mind, judge, that this thing

was talked of between Mr. Hill and Mr. Kittson commencing early in 1876 clear down to the purchase of the bonds. So many interviews were had when Mr. Hill was present on this subject that it is very hard for me to fix any one particular one. But there was a good deal said, and a good many interviews. Mr. Hill and Mr. Kittson used to come into my office time and again to talk it over. This matter of fixing the time or dates of these things, it is impossible for me to do. (1,391.)

The next day's examination of Mr. Farley related to subsequent matters. (1,397, Q. 209.) Other letters by complainant to Kennedy & Co. as to subsequent matters (furnished by Kennedy to defendant's counsel), were introduced (1,401–4); events in the spring of 1876 were again touched upon (1,403–14); Mr. Farley's knowledge of the bond issues and his services to the enterprise, Mr. Kittson's refusal to join unless Mr. Farley joined the enterprise (1,415–17); the course of the negotiations (1,418); the letter of August 17, 1876, asked for (1,421); a notice to produce letters given, and same produced so far as in Mr. Farley's power, and some of them introduced. (1,423–5.)

Mr. Farley was then cross-examined by his own counsel (1,425) as to details of the negotiations, conversations with Hill and Kittson (1,426–9); with Carp (1,429): the written propositions (1,430–1); subsequent interviews with Hill and Kittson, and newspaper articles (1,432–9); Mr. Kittson's letter to Mr. Farley (of January 14, 1880), showing they were personally friendly), introduced. (1.440, 1,498.)

A re-direct examination by defendant's counsel was had (1,441), as to the value of the railroads per mile, land-grants, terminals, etc. (1,441–54); the newspaper articles (1,455–70) and another letter to Kennedy (February 12, 1878,) (1,498), was produced by defendant's counsel, and the deposition of Mr. Farley as a witness for the defendants was closed. (1,472.)

Mr. Farley's two depositions have thus been so fully placed before the court, because defendants' counsel in the court be-

low attempted to make much of the error in the date of the main interview with Kittson and Hill, and will probably make the same attempt in this court.

W. H. FISHER.—FOR COMPLAINANT.

Mr. Fisher testified (331):

I reside in the city of St. Paul, Minnesota, and am president and general superintendent of the St. Paul and Duluth Railroad Company.

The first eighteen years of my life I resided in New Jersey. After that in the State of Iowa; most of the time in the city of Dubuque.

Was in the employ of the Dubuque and Sioux City Railroad Company, and the Iowa Division of the Illinois Central Railroad Company, with Mr. Farley.

I have been connected with the St. Paul and Duluth Railroad Company about four years.

Prior to my presidency of that company, I was the general superintendent of the road.

I came to St. Paul in the fall of 1873, when Mr. J. P. Farley was appointed receiver of the St. Paul and Pacific lines. He offered me the position of superintendent of those lines. I accepted it, and came here.

I continued with Mr. Farley as superintendent of the St. Paul and Pacific lines, during the time he was receiver, and operated them; and as assistant general manager of the First division of the St. Paul and Pacific Railroad Company during the time he had charge of those. Then after that I stayed with him until his receiver's accounts were all closed up.

In the winter of 1873 and 1874 Mr. Farley and myself called on Mr. Kittson at Mr. Kittson's office in St. Paul. (332.)

Mr. Farley and I called upon Mr. Kittson to see if we could make any arrangements with him to haul the freight from his boats from Glyndon to Crookston. Mr. Kittson had a line of boats on the Red river that he was running from Moorhead to Winnipeg; and I knew that in the summer months the water between Moorhead and Grand Forks would get very low, and we wanted to see if we could make any arrangements to haul those goods from Glyndon to Crookston, and deliver them to the boats there.

(Letters as to those matters identified, 333–5.)

I met Mr. Kittson very often. I think I called on Mr. Kittson once or twice a month until we commenced to haul his freight, which was in the fall of 1874; and after that I think that almost once a week I used to see Mr. Kittson.

At interviews between myself and Mr. Kittson and Mr. Hill, those matters were discussed; also at that time all of the freight to and from Manitoba had to go a roundabout way, over the Lake Superior and Mississippi, or the St. Paul and Duluth to the Northern Pacific junction, and then west over the Northern Pacific. Mr. Kittson and myself, and Mr. Hill and myself —and also talked with Mr. Farley—that if we could build from Breckenridge to Glyndon, and make fair arrangements with the First Division of the St. Paul and Pacific, between St. Paul and Breckenridge, that we could take the freight from here to Crookston at about the same time that it could be taken to Glyndon by the old way; and that we could deliver them at Crookston at the same rates that the Northern Pacific delivered them at Glyndon. It would make a saving in time, and it would reduce the rates just what we were charging them from Glyndon to Crookston. (335.)

I had frequent interviews with Mr. Kittson before it was decided to build that spur track. We met very often to talk about building it, and what it would cost, etc. After it was decided to build it he came to see me very often then, and couldn't get it done quick enough.

(Further letterpress copies of letters of 1873–5–6, identified, 336–41.)

I had conversations with Mr. Hill and Mr. Kittson very often in the summer of 1876. I had a conversation with Mr. Hill, I think it was early in the month of August, 1876.

Mr. Hill and myself, and Mr. Kittson and myself, and Mr. Farley, had all talked a great deal about building the Breckenridge cut-off. Mr. Kittson and Mr. Hill talked considerably about furnishing the money for building that cut-off. When Mr. Hill came into my office the morning I referred to, which I think was in the early part of August, 1876, we had some talk about the cut-off; and then I told Mr. Hill that I knew of a big thing if he had the money. (341.) I told him that the St. Paul and Pacific bonds (or, as we commonly called them, the Extension line bonds) were quoted on the market in Holland at five cents on the dollar. There was fifteen million dollars of the bonds, which at that price would only be seven

hundred and fifty thousand dollars; that the company had about one hundred and forty miles of completed road, for which they were entitled to six thousand four hundred acres of land for each mile; and then had a general talk about what it would cost to complete the lines as was originally contemplated, and about the amount of grading that was done on the balance of the road. At that time there was a little over thirty miles—thirty-four or five miles—completed from St. Cloud to Melrose, and one hundred and four miles of completed road, or about that, from twelve miles south of Glyndon north. I think the iron was laid to twenty-eight miles north or Crookston. He seemed very much interested in it, and after we had discussed it awhile he said he could get that money. He then got up and went into Mr. Farley's office a moment, and then went out of the building.

I think it was the next day or two, or a very few days after that, Mr. Hill came into my office and wanted me to go with him to see Mr. Kittson.

Mr. Hill and I went to Mr. Kittson's office, and Mr. Hill done the most of the talking. He told Mr. Kittson about this railroad property—what the bonds were quoted at, etc., and in making his statements to Mr. Kittson he would frequently refer to me to ask me if such and such a statement was not so; but Mr. Kittson said very little. I think we were there an hour; perhaps more.

Mr. Hill came into my office a few days after that and wanted me to go and see Mr. Kittson again. (342.)

Mr. Hill and myself went to Mr. Kittson's office. We had a general talk about the St. Paul and Pacific Railroad Company, and at that time there was a little talk about the First division of the St. Paul and Pacific Railroad Company, and Mr. Hill done the most of the talking. Mr. Kittson said very litttle; and I said very little except to answer Mr. Hill's questions.

I think it was the next day that Mr. Kittson came into my office and asked me if I would not come to his office about 10 o'clock Sunday morning, and says: "Don't say anything to any one about it, but just come up there quietly; I want to have a talk with you."

I went to Mr. Kittson's office that Sunday morning. Mr. Kittson was there alone; he closed the door, and asked me to sit down, and then handed me a cigar; he says: "Now, Mr. Fisher, Mr. Hill will talk by the hour about this railroad busi-

ness, and when he gets through I know about as much as when he started. I wish you would take your time, and explain the whole thing to me."

I went over the whole thing with him; told him what portion of the Extension lines were completed, and, as near as I could, the amount of grading that was done; that there were $15,000,000 of bonds issued; about 11,000,000, or between ten and eleven million—in that neighborhood—had been sold; that the balance had been put up as collateral with Lippman, Rosenthal & Co, bankers, in Amsterdam, Holland, for a loan of about $800,000—I believe that was somewhere near the amount; and that they were quoted on the market in Holland at five cents on the dollar.

He then asked me: "What about the First division?" I told him as near as I could about the First division matters (343); that is the First division of the St. Paul and Pacific Railroad Company; that they had 207 miles, I believe, from St. Anthony to Breckenridge, called the "Main Line," that was completed; and seventy-five or seventy-six miles, somewhere in that vicinity, from St. Paul to St. Cloud, and told him, as near as I could, what bonds were out; there was a small, insignificant mortgage between St. Paul and Minneapolis—I forget the exact amount now; it was one or two hundred thousand—somewhere along there; between one and two hundred thousand, I think it was; I don't remember whether that was 120,000 or 320,000; there was 1,200,000 and 2,800,000 of bonds on the branch line; there was a $3,000,000 mortgage on the main line; I think that $3,000,000 mortgage was a first mortgage out in the neighborhood of Morris, or somewhere out there, a 150 or 160 miles; then there was a $6,000,000 mortgage that was a second mortgage on this end of the line, and a first mortgage on the west end.

Now, I don't remember about these prices, but my recollection is, that the prices of these bonds ran all the way from fifteen cents to thirty-five cents on the dollar. Mr. Kittson says: "If I can assure my friends that they are sure of seven per cent. on the money, I can find the money; but I cannot make a success of this unless we have Mr. Farley interested." He said that he wasn't a railroad man, and Mr. Hill was not. He says: "It may be that we can't get all of these bonds, or a majority of them, at the prices at which they are quoted, and I would want Mr. Farley interested, so as to have his judgment as to what we could afford to pay for the different classes of bonds."

He then asked me if I would not talk with Mr. Farley about it, and see if he would be interested in this deal with us. He said, also, that he wouldn't have anything to do with it any way, unless Mr. Farley was interested; that even if they should buy the bonds, and get the property, they would have to depend upon Mr. Farley; and then he says: "And you to assist him in the management of it." He says: "Mr. Farley has made a great change in that property since he has managed it, and we have got great confidence in him." I says: "All right, Mr. Kittson, I will talk with Mr. Farley, and see what he says."

I went down to the office and Mr. Farley was there, and I told Mr. Farley what talk had taken place between Mr. Hill, Mr. Kittson, and myself. I went over the whole thing with him (344). Mr. Farley didn't say whether he would or would not become interested, but he made this remark: He says: "Fisher, where is Kittson and Hill going to get the money to buy these bonds?" So I didn't press the matter any further at that time.

The next morning I called to see Mr. Kittson, and told Mr. Kittson that I had had an interview with Mr. Farley, and had reached no conclusion. "I will talk with him again, Mr. Kittson, as soon as I get a good chance; but Mr. Farley asked me one question that will be necessary for me to answer before he will decide what he will do in the matter. He wanted to know where you gentlemen were going to get the money, Mr. Kittson." And Mr. Kittson laughed and said that Donald A. Smith was an old friend of his, and I think he said—I will not be positive about that, however—I think he said he was a director in the Bank of Montreal. But, anyway, he did state he was a relative of Mr. Stephen, the president of the Bank of Montreal, and it was through that channel that he was going to get the money. He says, "You can assure Mr. Farley that there will be no trouble about the money matter."

I had no opportunity to talk with Mr. Farley again until the next Sunday. We met in the office in the morning, and was having a general talk about the whole road, and Mr. Farley was feeling a little blue that morning, and in the conversation Mr. Farley says: "Fisher, the Dutch can afford to give away twenty-five per cent. of their bonds to the right parties in Minnesota, for the sake of having some home influence here." He says: "All being foreigners, they legislate them to death." I spoke up then; I said: "Mr. Farley, that is just what I have

been talking to you about; you know that the Dutch will not furnish the money to complete these lines, and they are worth nothing as they now are in these disjointed fragments. Now, if you can help the Dutch sell their bonds at what they are willing to take for them, and help Mr. Kittson and Mr. Hill get them, so they have got a good thing, and save this land grant, and secure the completion of these lines, and make some money out of it yourself, whose business is it, and what harm is there in it? Haven't you really done a good thing?" He hesitated a moment, and he says: "There ain't no harm in it, and it's nobody's business; but where is Kittson and Hill going to get the money? How are they going to buy these bonds?"

Then I told Mr. Farley that I had seen Mr. Kittson again since I was talking with him, and that Mr. Kittson and Donald A. Smith were very warm friends, and that Donald A. Smith and the president of the Bank of Montreal (345) were related in some way, and it was through that channel that they proposed to get the money. I says, also: "Mr. Hill is very anxious about this, and Mr. Hill says that Mr. Stephen has some wealthy connections—I think wealthy bank connections—in England." I says: "Mr. Farley, why won't you see Mr. Kittson and Mr. Hill and see what there is to it?" He says: "Yes, I will see Mr. Kittson and Mr. Hill." I says: "Shall I arrange an interview?" He says, "Yes."

I went and notified Mr. Kittson, and told him of the talk I had had with Mr. Farley. He says: "All right; we will be down there in a day or two." They came to Mr. Farley's office. I mean Mr. Kittson and Mr. Hill.

The meeting was in Mr. Farley's office. It was Mr. Kittson, Mr. Hill, Mr. Farley and myself. After they had exchanged a few remarks, and talked a little about the pleasant day, and so on, Mr. Kittson spoke up and he says: "Mr. Farley, I suppose Fisher has told you what we were talking about." Mr. Farley smiled, and said: "Yes, Fisher says you and Mr. Hill want to buy a railroad." And they all laughed and Mr. Hill said: "Yes, it looks that way." Then Mr. Kittson asked Mr. Farley what he thought about the purchase of these bonds. Mr. Farley said: "If they could be bought at anything like the prices quoted at, there is a big thing in it." Mr. Kittson asked him if he would be interested with them. Mr. Farley said: "It will take some money to buy those bonds, Mr. Kittson." Mr. Kittson said: "Yes, but I guess I can raise the money

all right." Mr. Hill spoke up and says: "There is no trouble about the money, Mr. Farley." Mr. Kittson says: "We want you interested, Mr. Farley." He says: "I won't have anything to do with it unless you are interested with us." He says: "We don't know anything about railroads." And he then said to Mr. Farley substantially what he had said to me before, that they might not get all of these bonds at present prices, and he would have to depend upon his judgment as to what they ought to pay. Mr. Farley told Mr. Kittson that he had no money. He said: "I have no money, Mr. Kittson." Mr. Kittson said: "We don't want you to furnish any money." Mr. Hill says: "Certainly not." (346.) Then Mr. Hill explained how they would get the money. He went over the thing again; about Mr. Kittson's acquaintance and friendship with Donald A. Smith, and his relations, etc., with Mr. Stephen—the president of the Bank of Montreal; and it was through that channel that they were going to get the money. Then Mr. Kittson says: "We will furnish the money, Mr. Farley. We don't want any money from you. What we want of you is your judgment and advice, and we will attend to the rest of it."

Mr. Farley asked him then how many there would be interested. Mr. Kittson said: "We will have to take in a couple of those Montreal men, Mr. Farley; that would make five of us; the two Montreal men and us three; that would give us one-fifth each." Mr. Farley says: "Don't you think we had better take in Horace Thompson, and two or three other prominent men here, for the sake of their influence?" Mr. Hill says: "No; we don't need them." Mr. Kittson spoke up and said: "I don't think that is necessary." Then Mr. Farley asked them if they thought the Montreal men would be satisfied to furnish this money and have only a two-fifths interest in the property. Mr. Hill spoke up and said: "Why, yes; they are doing well enough; they probably won't put in a dollar of their own money; they will get the money through the bank." He says: "We want a majority here in St. Paul." Mr. Kittson spoke up, and said that he thought they would be satisfied with that; "but, if anything comes up that makes it necessary to take in anybody else, we can consider that then, and take them in if necessary; but whatever we do we will divide our St. Paul interest equally amongst us three here." Mr. Hill said: "All right." Mr. Farley said: "That is all right."

Then they talked a good deal about what they would do in case they bought these bonds. Mr. Farley says: "If you get the majority of the bonds, or as near the whole lot of them as you can, the thing to do is to try and settle with Litchfield, and get his stock. If you can get the Litchfield stock, you would save a good deal of time and expense in foreclosing; but if you cannot get the Litchfield stock, why you will have to step into the Dutch shoes—take the place of the Dutch bondholders, and go ahead and foreclose—organize a new company—put on all the securities the property will bear—use enough of the securities to pay back what the bonds cost, and the balance is profit in the thing." Then he took his pencil, and went to figuring, and he figured over and made an approximate estimate of what it would take to buy all of these bonds, and about what it would take to complete the road. They had considerable talk about that. Then Mr. Kittson spoke up and spoke about the former management, and says: "We will have to keep this thing to ourselves;" and Mr. Hill says: "Certainly." He says: "It won't do to let anybody know anything about it." He said: "If Becker knew what was going on, he and Bigelow would move heaven and earth to get you out of here." And Mr. Kittson says that it wouldn't do to let it go back to the former management; that they would skin the thing alive; and, if they did, he wouldn't want anything to do with it. Mr. Farley turned around to me then, and said: "Now, Mr. Fisher, we will have to keep this thing perfectly quiet." I think that is the substance of the conversation.

I think I have stated it about as it was. (348.)

Mr. Kittson and Mr. Hill used to come into Mr. Farley's office on an average of every ten days or two weeks, and go into Mr. Farley's room, but I was never present at any of their interviews. They used to go in there very often by themselves. They went into the little room from the treasurer's office. They did that very often. They used to have interviews there very often; from an hour to an hour and a half at a time. (352.)

Mr. Fisher was cross-examined at great length and stated in substance (354-5):

My age is forty-two years.

I went to Iowa in the spring of 1864, and went to work for the Dubuque and Sioux City Railroad Company. My recol-

lection is that George Young was then superintendent; and that Mr. Farley was president and general superintendent of the Dubuque and Southwestern Railroad Company, a road that connected with the Dubuque and Sioux City Railroad at Farley.

I think it was in 1866, Mr. Farley was appointed manager of the Dubuque and Sioux City Railroad Company. I was employed by that company about two years before Mr. Farley was connected with it. I think he was appointed general manager; I won't be positive; anyway, he was managing man in Iowa.

I do not remember the position that I had when Mr. Farley took possession. I started in as check clerk. I started in at the bottom. I done a little switching in the yards. I was check clerk awhile, bill clerk, abstract clerk and cashier. I think that at the time Mr. Farley took possession I was bill clerk in the local freight office at Dubuque.

Mr. Farley took me in there as chief clerk in his general office. I don't remember, but I think it was about a year after Mr. Farley had managed the property, I became Mr. Farley's chief clerk." (355.)

I think that was about sixty-seven.

After the first year I had full charge of his office; all of the correspondence; making of the pay-rolls, vouchers, car mileage, etc. After I had been there about a year, Mr. Farley was called to Des Moines on some legislative matters, and I was really his chief assistant from that time, not only in the office, but on the outside; looking after everything that I could look after that was for the interest of the company.

I continued in that position until Mr. Farley resigned, and some little time afterwards.

He was in the habit of dictating letters to me. Mr. Farley done more writing himself then, than he did after he came here.

I took a position with Mr. Farley in his office as receiver of the extension lines of the St. Paul and Pacific Railroad Company, in the fall of 1873. My recollection is, it was early in October.

Mr. Farley made me superintendent of those lines, and his attorney in fact.

I did everything that was to be done as far as that was concerned. The first thing I done when I came up here—Mr. Farley had already hired a foreman and a crew of men to put

the 104 miles of road in the Red River valley in condition to receive the lands. That took until—I don't remember the exact date, but I think it was along (356) about the first of December, or near there, when they got through. I looked after that. When the work was done, paid off the men; put the tools away. Then I had maps made and certificate of the chief engineer—I think the chief engineer and receiver—certifying to the completion of the 104 miles. I think it was 104 miles. I think that in that certificate it included the thirty odd miles or thirty-six miles between St. Cloud and Melrose, and the 104 miles in the Red River valley; starting twelve miles south of Glyndon and running twenty-eight or thirty miles north of Crookston. Then we went to work at the local land offices, and selected the lands that the company was entitled to for completed road.

As I said before, the first thing was to put the property in shape, and try and find out what the company owned. We was trying to find out what the company had; but as I said before, we done everything we thought necessary to be done to look after the property and get everything we could that belonged to the property, and secure the lands to the company—defend their litigation, and so on. There was a bill passed that winter. We fought that in the legislature.

I took part in the legislative contest.

I worked under Mr. Farley's dictation and was responsible to him.

I wrote most of his letters, I think. I wrote a great many of them, anyway. (357.)

I remained with Mr. Farley during the whole period of his receivership, and down to the time of the final settlement of his accounts.

I cannot give you the exact date of that. I think it was in 1880—perhaps in 1881.

Then I went in partnership with Mr. Wellington.

I would not be positive about that date without looking it up. I think it was in 1880 or 1881.

My best recollection is it was a little over a year after the spring of 1879—after the foreclosures took place in the spring of 1879—but I would not be positive about that date. I do not mean to say that I remained with Mr. Farley until he was finally discharged by the court. I stayed with Mr. Farley until everything was closed up, and until everything was done.

I went into buying and selling land, and in the tie business with Mr. Wellington. (358.)

I have been from the time I was eighteen years old until I left Mr. Farley in the railroad business.

I think I was very close to Mr. Farley in a business way, and think I enjoyed his confidence.

I have had no occasion to think about it since—I don't know but that it was in 1880 when I severed my connection with Mr. Farley. That would make the most of the year 1879, I would not be positive about that date. I don't think I can tell within a year.

If you are particular about it, I could look it up.

Mr. Farley took possession of the lines of the First Division Company, and assumed control of their operation in the spring of 1876. Upon his doing so I became his assistant manager.

I think J. B Rice was assistant superintendent when Mr. Farley was appointed, and he retained him; made no change in that office.

I think until in the spring of 1879 I remained in that position. (359.)

I couldn't give you the exact date, but while I stated I remained with Mr. Farley during the time he was general manager of the first division, it is substantially correct, although it is not technically so. It was a short time before. I left the First Division Company a short time before Mr. Farley did. I don't remember whether it was two or three months, or the exact time, but it was pretty nearly the end of his managing the first division when I left. Mr. Wakeman come on and took my place.

I will not be positive, but I think it was just before the first of the foreclosure sales. It was near that time.

E. H. Shaw was assisting us in locating the lands, and a man by the name of Close was there a short time. They may have written some letters for Mr. Farley, but I have no recollection of it.

After he became general manager, down to the middle of May, 1876, I think he had in his office Samuel J. Beals, and I think he also had Mr. John Knuppe. That is my recollection that he had those two young men in his room. (360.)

When I say, in my direct examination, that Mr. Farley was busy on my putting a letter on his desk, I don't mean to have you understand that I remember on the 11th day of May, 1876,

I handed Mr. Farley a letter, and that Mr. Farley was busy. No, I do not mean to say that. I suppose I could safely say that he was busy, for he is a man that is always busy. I couldn't pick out any particular day.

That may have been the case, but it is more likely that that letter was dictated to me in the evening, that he did go home, and that I laid it it on his desk the next morning.

I was very seldom there before he was; Mr. Farley was an early man, he was most always there. (361.)

(The course of business, as to writing and mailing letters inquired about 361–3; also, the translation of cipher dispatches in 1877, etc., 363.)

The date of the first conversation with Mr. Hill, in which I informed him that the bonds of the fifteen million issue were quoted on the market at five cents on the dollar etc., as nearly as I can give it, was in the summer of 1876, and my best recollection is— well, it was along about— I think it was early in August; won't be positive about the date.

I had a talk with Mr. Hill first about a month before. (367.)

The talk when Mr. Kittson and Mr. Hill met Mr. Farley by appointment in my presence may have been early in September. Mr. Farley took possession of the First Division in the spring of 1876. It was after he took possession of the First Division Company, because this talk was in the general office building—the old stone building that stood about where the Union depot now stands. Now, it was after he took possession as general manager for the company, and these talks were all during warm weather. Now the day they were in Mr. Farley's office it was before we had commenced to have any fire, but it was cooler; it was a nice cool day; and it was before the trustees took possession. They took possession in the fall of 1876, and it was before Mr. Carp was out here. He was out here in the fall of '76.

The trustees took possession in the fall of 1876; I think it was in October. I couldn't state the exact date, but I think it was in October.

I don't know what Mr. Farley testified to. My best recollection is that it was before Mr. Farley—it was before the trustees took possession. I will not undertake to say whether it was in August or September. It may have been earlier than that.

It was a right pleasant day—the day we were all together. We had had some right hot weather before that. The day I was in Mr. Kittson's office it was a very hot day. (368.)

The day I first saw Mr. Hill and told him I knew of a big thing, it was summer weather, a pleasant day.

When I gave Mr. Hill at the first interview the information, stated in direct examination that there were fifteen millions of bonds on the Extension line, and that these bonds could be bought for five cents on the dollar, it seemed as if it was a new piece of information to him.

I used to keep a box of chewing tobacco on the top of my desk, and Mr. Hill was in the habit of coming in and taking a chew of tobacco and exchanging a few remarks with me. He come in that morning and done the same thing, and when I told him this he reached around—there was a chair sitting there—and sat down by me like this, (indicating) and we talked the whole thing over. After we had talked the whole thing over, about the last remark he made was, he slapped his hand on the table and said, "By God, I know where we can get that money." That is about the remark he made.

I understood him to mean ourselves. It was Hill and myself that was talking at that time. That is, he knew where he could get it. There was nothing said—the talk was about the price of the bonds—how many bonds there were out; what they would amount to at that price; how much road there was completed, and portion of the uncompleted road being graded; the lands they were entitled to, etc.; and he said, "By God, I know where we can get that money," or "I know where that money can be found,"—something like that. He may not have used the word "we." I won't be positive about that.

I am giving his language pretty close; he slapped his hand on the table and said—it may be that he said, "I know where we can get the money." The understanding that I got was that he knew where the money was. He knew where it could be found. (369.)

I think I have given it substantially correct. I would not undertake to give word for word what a man said so long ago; but I guess I have given the facts. As he made the last remark he slapped his hand down on the table. He was sitting at the corner of my desk like this (indicating). No, sir; my recollection is he brought his hand down like this (indicating) on the table. Not on his knee. No; he was pretty close to the table, Judge. When I made the first remark to him, he

reached around and pulled up a chair and put it just about as close to my desk as he could get it. I don't recollect that he asked me anything as to how I knew all these things. I told him they were quoted at five cents on the dollar. My recollection is that I said they were quoted at five cents on the dollar, and that if they could be bought for that it would amount to $750,000. I don't recollect that he asked me how I knew. It is possible that I couldn't remember every word of that conversation, but I remember the substance of it very well. (370.) As to my having any pecuniary interest in the business, I don't know that Mr. Hill and I talked about buying the bonds. I showed this thing to Mr. Hill and showed him what there was in it; what a man could do if he had this money; what a transaction it would be. $750,000, if these bonds could be bought at that price, would take all this property. At the time of that conversation, this idea that these bonds were quoted at five cents on the dollar, and, if they could be bought for $750,000, the man who bought them could take all that property for that money, my recollection is that it was only a very short time before that I had it in my mind—that it was only a few days before that that I learned these bonds were quoted in Holland at five cents on the dollar.

I think Mr. Farley told me of that. I won't be positive whether I learned it from Mr. Farley or Mr. Knuppe. Almost right away after that, it struck me as being a low price—five cents on the dollar—for those bonds.

The value of those bonds would depend a great deal upon circumstances. (371.)

Those bonds were worth, in my estimation, between two and three million dollars. They represented 140 miles of completed road with the land grant.

That 140 miles of completed road with the land grant ought to have been worth $20,000 per mile. $750,000 was recognized by Mr. Hill, as well as myself, to be a very low price for the property that those bonds would take, and that it would be a very nice thing for any one who purchased them at that price.

Well, I say I made no estimate as to the value. The bonds would be worth what the property was worth that the bonds would take.

I don't remember whether I learned that (as to the price) from Mr. Farley or Mr. Knuppe. I had had a good deal of talk with Mr. Farley about the First Division bonds, but I do

not remember whether it was through him that I got the price of the extension line bonds, as we call them. It was either him or Mr. Knuppe. I don't remember which. (372.)

In this first conversation with Mr. Hill, nothing was said about the First Division bonds, at the first interview. In this talk we merely talked of the extension bonds?

If any man had offered to furnish the money and take me in, I should have been glad to have accepted.

I think I did furnish the idea of the scheme to Mr. Hill at that time.

Yes, sir; at least he didn't intimate that he ever thought of it before. I don't know as there was any scheme; I told him of the price of the bonds. I told him I knew of a nice thing if a man had the money.

We went into the details as far as the property was concerned. It is a long time since I have had anything to do with that property, but at that time I knew about all the grading that was done, and the exact distance of the uncompleted portions, and so on, etc. We went into it far enough to make an approximate estimate of what it would cost to buy the bonds and complete the St. Vincent extension. That was about what we talked about.

My recollection is that the estimate then made with Mr. Hill as to what it would cost to complete the extension lines, was about two millions of dollars, or a little over. I think I estimated it at ten thousand dollars per mile to complete the whole thing. I won't be positive about that estimate. (373.)

I have made a good many estimates since that on railroad work.

As to the length of road that was completed, I don't remember if he asked me any questions, but I stated that to him when I told him about what the bonds were quoted at; I told him those bonds would take about 140 miles of completed road.

Well, I don't know that I could give everything that he said. When I told him that those bonds were quoted at five cents on the dollar, making $750,000 for the whole amount, he drew up his chair and sat down, and the conversation then was general between us, just as two men would talk over a thing of that kind.

We had a good deal of talk with Mr. Hill about building the Breckenridge cut-off. At one time they were going to furnish the money to build the Breckenridge cut-off; in fact, I

think we were talking about it at this time. Mr. Kittson and Mr. Hill were going to furnish the money to build the Breckenridge cut-off, and I guess they would have built it, but there was some little hitch in furnishing them the protection they wanted; and, in talking about the Breckenridge cut-off, Mr. Hill had made the remark a number of times that there was no trouble about their furnishing the money.

That is the reason I mentioned this scheme to Mr. Hill, rather than to anybody else.

Yes, sir, I know of no man here that I was any more intimate with at that time than I was with Mr. Kittson and Mr. Hill; we were doing business with them then; everything was very pleasant between us; met them often.

This first interview with Mr. Hill lasted perhaps half an hour; wouldn't say positively; it was in the morning; I think it was when Mr. Hill first came down-town; it might have been half an hour.

I have stated in my direct and in cross-examination all that I remember of what was said at that first interview with Mr. Hill. (374.)

I think I have stated substantially what was said.

The next talk I had with Mr. Hill was when he come down to ask me to go to see Mr. Kittson.

That was very soon; only a day or two, or two or three days after.

Mr. Hill told Mr. Kittson about what I had told Mr. Hill, only he said a good deal more; that is, he elaborated on it some.

How did that seem to strike Mr. Kittson—with the air of novelty? Mr. Kittson said very little; Mr. Hill did the most of the talking. I know that I got the impression from Mr. Kittson, at both of these interviews, that he took very little interest in it.

No; he didn't seem to enthuse over it; he didn't seem to warm up to it; he said very little, Mr. Kittson did.

So far as I could judge from his action, appearance, etc., this was as new to him as it had been to Mr. Hill; there was nothing said on that point; but that was the inference I drew. (375.)

I do not recollect that Mr. Kittson asked me how I knew or how Mr. Hill knew all or any of the things which were told Mr. Kittson at that interview.

I guess I was there half or three-quarters of an hour.

I would not say positively how long I was there. I know I was there quite a little while.

After that interview Mr. Hill and I next went to Mr. Kittson's office on this matter, in about a week. I wouldn't be positive about that. It was a few days.

Mr. Hill came down to the office, and asked me to go up with him

At that interview—oh, it was a general talk. Mr. Hill done most of the talking. Mr. Kittson displayed very little interest in the matter. Oh, he would say, "yes, yes," to things that Mr. Hill would say, and sometimes Mr. Hill would refer to me; but Mr. Hill done most of the talking.

Talking about buying these bonds and foreclosing the property, completing the road, and getting the balance of the land.

I don't remember whether there was anything said about the First Division bonds at the second interview or not. There had been nothing said about the First Division bonds before that. My recollection is that the first talk that was had about the First Division bonds was had when I had my talk with Mr. Kittson, although they may have talked a little about them at this second interview that Mr. Hill and I had with Mr. Kittson. (376–7.)

My recollection is that the two interviews that I had with Mr. Kittson and Mr. Hill, at Mr. Hill's request, was almost exclusively of the St. Paul and Pacific—of the extension lines.

I would not want to state positively about the second interview as I would about the first, although I don't think there was at the second. It lasted a few minutes—perhaps a half an hour; perhaps longer. I would not say exactly.

When I left Mr. Kittson's office after the second interview, I went to my own office.

That is mybest recollection. My recollection of the second interview was—it gives me the impression that Mr Hill was trying to get Mr. Kittson interested, and when I left the office the second time, I felt as if it was a hopeless case. I felt that Mr. Kittson didn't take much interest in it. That was the impression that I had.

I don't remember of having any talk with Mr. Hill until after I had had a talk with Mr. Kittson alone. I think it was the next day after the second interview that Mr. Hill and I had with Mr. Kittson. I think it was the next day after that that

Mr. Kittson came into my office. I was sitting at my desk writing, and he come up to me and spoke in a low tone of voice. Well, he leaned over and spoke to me in a low tone of voice, and asked me to come to his office about 10 o'clock Sunday morning. He says: "Don't say anything to anybody about it, but just come up there quietly. I want to have a talk with you." That is the substance of what he said, and I had no further talk with Mr. Hill until after I had a talk with Mr. Kittson. (377 8.)

I think it was two days, or two or three days before Sunday. I will not be positive about that. It was a day or two, or two or three days.

I went to Mr. Kittson's office Sunday morning, about 10 o'clock. I think the door was open when I went upstairs.

Mr. Kittson said, "Good morning," and he got up and shut the door after I went in, and he asked me to sit down.

Handed you a cigar, didn't he?

A. Yes, sir; I think he passed a box out, and we each took a cigar. My recollection is pretty clear, Mr. Kittson handed me a cigar that morning. Yes, sir; that is my recollection—that Mr. Kittson handed me a cigar that morning, and I lit it and smoked it.

Mr. Kittson begun the conversation. He says: 'Mr. Hill will talk about this railroad business by the hour.' I will not be positive about his saying 'Mr. Hill;' I think he said: 'Jim talks about this railroad business by the hour, and when he gets through I know about as much as I did when he started.' That was the substance of it.

He wanted me to explain it to him. He asked me to explain it to him. I think he asked me to take my time, or be slow. He wanted me to tell him all about it. (378.)

I think Mr. Kittson said: 'I wish you would take your time now and tell me the whole thing.' I would not undertake to state it word for word, but that is the substance of it.

Then I went over the ground carefully with Mr. Kittson so far as the extension line was concerned—the St. Vincent extension more particularly—and told him there was 140 miles of completed road, and they were entitled to the lands, and gave him a general description of the thing. And when I done that, my recollection is that that is the first time that the First Division bonds were mentioned, because he asked me about the First Division, and I think he said if a man was going to do anything with the Extension bonds, why not include the

First Division. My recollection is that that was about the way it was put. I told him as near as I could about the First Division.

About the fifteen million Extension bonds, I told him that there was ten or eleven—eleven, I believe it was—eleven millions of bonds sold, or about that, that had been sold, and that the balance were put up as collateral for a loan, and that they were quoted at five cents on the dollar.

It would be seven hundred and fifty thousand dollars. I think it was 320 miles from St. Cloud to St. Vincent, and there was thirty-six miles completed between St. Cloud and Melrose, and 104 miles completed in the Red river valley, and then there was a good deal of grading done north of Snake river. I think it was graded to within twelve or thirteen miles of the boundary line; I will not be positive about the number of miles.

My recollection is I told him there were about four millions or a little over—I don't remember exactly; I did know at that time exactly—put up with Lippman, Rosenthal & Company as collateral for a loan of eight hundred thousand dollars. Now, I may be wrong about that eight hundred thousand dollars. I knew exactly at that time. I think it was eight hundred thousand dollars. (379, 380.)

Did I tell him who Lippman, Rosenthal & Co. were?

I do not remember. I presume I did. They were bankers in Holland.

I knew nothing about the details of that transaction with Lippman, Rosenthal & Co. I only knew that as I knew everything else—that is, as we learn of these things. I learned that those bonds were put up in that way, and our understanding of it was that those bonds, as well as the other bonds, were beyond the reach of the company; that is, they were out—practically out—where they had been put up as collateral.

The most of my knowledge came through Mr. Farley in that respect.

As to how you could get these bonds from Lippman, Rosenthal & Co. without paying off that eight hundred thousand dollar loan?

No, sir; there was nothing said at that time. There was nothing said at that time as to how you could buy any of the bonds.

How to pay off the loan and get this four million or so of bonds had not been considered. (380.)

(The subject of this collateral arrangement, and the method of getting at the bonds, continued to some length. 380-383.)

Now, I will not be positive, but I think Mr. Hill went east after that meeting; and when he returned then he wanted to send a man, or suggested to send a man, to Holland, to go to buying these bonds; and Mr. Farley suggested that Mr. Carp would be here soon, and that the bonds that were in the hands of the committee were the bonds that they wanted. (382.)

The mode of buying the bonds was not discussed with Mr. Kittson on Sunday. He first spoke of the First Division matters. (383.)

I would not say whether this Sunday interview was in August or the first part of September, *or before that*; but I think these interviews ran along from about the first of August to about the first week of September; *but I would not be positive about it.* I would not be positive that this Sunday interview was later than July. I would not be positive it was any earlier than July. It was the first summer Mr. Farley had charge of the First Division Company as general manager. He was appointed manager by the directors,—I would not be positive whether it was in March or April. I know there was snow on the ground the first trip we went over the road. The change of management was the result of an agreement between the First Division Company and its bondholders and stockholders.

As to the Litchfield agreement of August, 1875, (whereby the change took place in the spring of 1876), coming to an end in August, 1876, and the Litchfield interest then being in a position to demand possession,—that may have been so, but I don't remember it now. I may have written letters for Mr. Farley about it in the summer of 1876. I would not state positively. (385.)

I remember a great deal of anxiety about the old stockholding interest trying to get possession after the trustees had possession, but I have no recollection now of anything of that kind before that. Still, I may be mistaken. (386.)

As to the letter from Mr. Barnes of July 25, 1876, Ex. 94, p. 256, referring to the withdrawal of the pending agreement:

I do not remember when the trustees took possession. I had no notice of it at all. I didn't know a thing about it until the morning Mr. Farley and the trustees started to go over

the road. It was kept perfectly secret so far as I was concerned. When I went down to the office that morning, the engine and business car stood there in front of the depot. That was the first that I knew that they were going over the road. I had the night before seen Mr. Kennedy at the Metropolitan hotel, and just merely spoke to him, and afterwards, when I saw Mr. Farley, I says, "I saw Mr. J. S. Kennedy at the Metropolitan hotel," and Mr. Farley says, "Yes; he don't want anyone to know he is here yet; don't say anything about it." Then when I went down to the office the next morning—early in the morning—there was this special train ready to go over the road; and, as I said before, that was the first I knew about it. (387.)

I have no recollection of seeing this correspondence. In other words, there was some correspondence between Mr. Farley, Mr. Kennedy and Mr. Barnes that I didn't know anything about. It was a surprise to me when the trustees took possession of that property.

(As to witness having written letters on that subject,—counsel for the complainant object to the question, for the reason that the letter books of the complainant are now here present and offered to counsel for the defendants, which they may examine, and, if such letters appear, they may be produced and shown to the witness.)

I may have done so, but I have no recollection of it now.

I am not able to fix the date of any of these interviews with Mr. Kittson or Mr. Hill, or both of them, by reference to the date of the termination of the agreement between the stockholders and the bondholders and the trustees, or by reference to anything that was said or done at or about that time in regard to any scheme by the stockholding interest to the possession of the property. (388.)

It was the first summer that we were on the First Division. It was after we moved into their general offices and had settled weather. It was in the summer of 1876. I wish I could give you the exact date, but I will not be positive about it,—whether it was in August or September, or before that.

This last final conversation was before the trustees took possession, I think. I think I will state that pretty positively. I do not think the trustees took possession until October. It was cold weather. I think we began to have a little fire. It was earlier in the season than that.

In my first talk with Mr. Hill, in which I told him that I

knew of a big thing, I don't remember whether we talked any about the cut-off that morning or not. We may have talked some about the building of the cut-off. We had, previous to that time, talked a great deal about the building of the cut-off, and Mr. Kittson and Mr. Hill were to furnish the money. But we had just a short conversation before I made that remark to him that I knew of a big thing, or a good thing, something like that, if a man had the money, or if we had the money—words to that effect. (389-90.)

My recollection is—I am not positive about it, but my recollection is—that Mr. Farley was corresponding with Kennedy & Co. about it. My recollection is that Mr. Kittson and Mr. Hill were willing to furnish this money, if proper arrangements could be made; that is, if they could be protected in some way—some kind of a guarantee. They didn't want to furnish the money to build a little piece of road in there, and take the chances of getting squeezed. They wanted to be protected.

Those negotiations I think were going on about the time of the first conversation.

I had some knowledge of it. I talked a great deal with Mr. Kittson and Mr. Hill and Mr. Farley, but I can't say that I saw all of the correspondence, or that I went into the details in regard to making an agreement about it. I was very anxious to have the cut-off built—very anxious. I am not sure but that I suggested the propriety of building that myself. I will not be positive about that, though.

Mr. Farley became general manager of the First Division lines and I became assistant manager in the spring of 1876, but I would not be positive which month. I know that the first trip we took over the road there was considerable snow on the ground, and it was a spring snow. I wouldn't say whether it was March or April. We were delayed some west of Willmar.

I wouldn't be positive about it, but I think Mr. Barnes came out here pretty soon after that. I wouldn't be positive about that. I am not sure. I think Mr. Barnes was here twice that year, but wouldn't be positive about it. (390.)

I think Mr. Carp was here twice in the winter of 1876 and 1877. I think so. I don't remember of his being here more than twice when I was here. He was here right after Mr. Farley had been appointed receiver, but it was before I had got here. After Mr. Farley made arrangements for me to

come here, it was a couple of weeks or so, and I think it was Mr. Barnes and Mr. Carp that met Mr. Farley in St. Paul the first time he came here; but I have no positive knowledge about that.

He was not here during 1875, that I remember of; my recollection is, the first time I ever saw Mr. Carp was when he was here late in the fall or early in the winter of 1876; that is, the winter of 1876 and 1877. That is the best of my recollection.

In this first conversation with Mr. Hill I don't remember positively whether we put any particular value on the property. After I mentioned to him that if those bonds could be bought for five cents on the dollar—$750,000—why we both recognized the fact that it was a big thing; but I will not undertake to state now whether I made an estimate or not; I rather think we did have some talk then about what it would cost to complete the road and so on, but I will not be positive about that now.

Well, I don't know as I made any estimate. In figuring about the extension line, we always figured in connection with that—the completion of the work. I think we made some figures about what the lands would come to, even at the government price, $2.50 per acre. I think I recollect some conversation of that kind, but I would not be positive. (391.)

The property of the extension lines, as it then stood, we regarded it as comparatively little value as long as it remained in those disjointed fragments.

In my Sunday conversation with Mr. Kittson, I don't remember as I gave him the value in dollars and cents. I stated to Mr. Kittson that, if those bonds could be bought at what they were quoted at, they would take 140 miles of completed road; and I went on and stated the whole thing — that they had thirty-six miles completed on the south end, and 104 miles n the valley. At that time I could tell him exactly where the igrading was done, and where it was not. We had a general talk about it, and went through the whole thing, and the idea was that $750,000 would buy 140 miles of the completed road, and the lands appertaining thereto.

Up to that time—I don't remember when the court decided against the De Graff bill—but up to that time we couldn't do anything in the way of settling up the country, except what few homesteaders and pre-emptors went in.

The lands were tied up under what was known as the De

Graff bill. The legislature passed a bill putting a lien upon those lands to satisfy a claim that De Graff & Company had against the road, and those lands were tied up under that bill until the court decided the bill was null and void. I believe that was the fact. That is my recollection of it. (392.)

They were not conveyed to the State of Minnesota before that bill was passed; my recollection is that that bill was passed before the government had certified those land to the state for the use and benefit of the road.

My recollection is that after we made arrangements with Mr. Kittson to haul his boat's freight, that we showed some net money—some net earnings.

Our business with Mr. Kittson's line was confined to the season of navigation on the Red river.

My recollection is that the river opens in April, and I won't be positive, but I think it closes in the early part of November; it varies a little; I will not be positive about that; I did know at the time.

We did not commence doing business with Mr. Kittson in 1874, until quite late in the season. (393.)

I think we showed some net money in 1875; I will not be positive.

In 1876, I couldn't give the amount of those net earnings; in my Sunday conversation with Mr. Kittson, my recollection is, I did not explain the earnings; I don't think Mr. Kittson asked anything about it, although he may have done so; at that time I was familiar with those earnings.

I remember that I told Mr. Kittson that there was 15,000,000 of bonds on the Extension line; that there was some of them either put up as collateral, or held as collateral; I would not be positive about that.

I told him, as near as I could, how many there were of the First Division bonds; there was a $2,800,000 issue; I think that was the amount. (394.)

I don't remember that any of that $1,200,000 issue was up as collateral; I will not be positive about that now.

When it came to the First Division matters, while I knew pretty well the issue of the bonds—that is, what bonds had been issued—I couldn't go into the detail of it. My recollection is that I told him of these different issues of bonds, and that they were selling from fifteen to thirty-five cents. I will not be positive about it now.

On the main line I told him there was a three million issue

and a six million issue; that is my recollection; on the branch line, $1,200,000 and $2,800,000. That is my recollection. Making nine millions of bonds then on the main line, and four millions on the branch line—that is my recollection. I think some of those bonds had been retired for land—a few of them—but I do not remember now how many. I had a general idea at that time. (395.)

My recollection is that, when Mr. Kittson asked me, "how about the First Division?" I think he asked me that question, "How about the First Division?" and of the First Division matter, if that hadn't better go in—or, if anybody was going to take the extension lines, if they hadn't better take the First Division too? And my recollection is that I told Mr. Kittson about these different issues of bonds, and that they were quoted at from fifteen to thirty-five cents; but I would not be positive now. It is ten or eleven years ago; but I think that is the way I put it to him.

My recollection is, after I had told Mr. Kittson as near as I could about these different bonds, then Mr. Kittson says to me: "Now, we cannot do anything about this," or "We cannot make a success of this"—something like that—unless we have Mr. Farley interested." Then he asked me what I thought about Mr. Farley.

I think stating that was in answer to your question. I think you asked me about what Mr. Kittson said they would do in case they bought the bonds or got less than the majority.

Mr. Kittson didn't decide to buy any bonds at that interview. (396.)

My recollection is that Mr. Kittson said that Mr. Farley—I wouldn't be positive about the exact words—whether he said he had made a great change in the property, or whether he said he had improved the property, but that is the substance of it; that he noticed a change in the management; and my recollection is that Mr. Kittson also said: "Between you and I, I didn't have much confidence in the former management." I think Mr. Kittson said something like that also; I wouldn't undertake to give the exact words.

Mr. Kittson asked me if I would not talk with Mr. Farley, and see if he would be interested in the deal with him.

I presume that Mr. Kittson could have talked with Mr. Farley, but my recollection is that Mr. Kittson was more intimately acquainted with me, and I think I am safe in saying that Mr. Kittson would talk to me more openly—friendly—

about certain things than he would to Mr. Farley; I may be mistaken about that. As I was looking after the details of that business, I think up to that time I saw Mr. Kittson ten times to Mr. Farley's once; but as to what his reasons were, I didn't ask him, and he didn't tell me what his reasons were; my recollection is he made this remark after we had talked it over, and he said what I have said he said: "Suppose you talk with Mr. Farley and let me know," or, "See what Mr. Farley says, and let me know"—something like that. (397.)

I saw Mr. Farley in less than an hour after that. My recollection is, that I went from Mr. Kittson's office to my own office, and Mr. Farley was in his office right adjoining mine, and I went right in and went to talking with him about it.

This conversation on this Sunday with Mr. Farley was the first conversation I had had with him with reference to any purchase of these bonds by Mr. Kittson or Kittson and Hill, or any project of buying up these bonds, or getting control of the property. I had learned in regard to the prices at which the First Division bonds were quoted, from Mr. Farley.

Mr. Farley and I had talked about it a good deal. When Mr. Farley first came here, it was understood that the Dutch bondholders were going to furnish the money to complete the lines, and foreclose on the First Division, and he was going to —that they wanted him to—manage the whole property after they had done that, and Mr. Farley and I had talked a good deal about that. (398.)

I do not think Mr. Kittson said anything about the relation between Smith and Stephen. On the first interview, I think, I went back to Mr. Kittson's. Now, when I talked with Mr. Farley, Mr. Farley asked me where Mr. Kittson and Mr. Hill was going to get the money. He couldn't understand where Mr. Kittson and Mr. Hill could get money enough to buy all of these bonds. Then I went back to Mr. Kittson the next day, and it was then that Mr. Kittson told me through what channel they would get this money. I couldn't give his exact words. He was an old friend of Donald A. Smith, or Donald A. Smith was a warm friend of his. I will not be positive, but I think he said Donald A. Smith was a director in the bank of Montreal; but I won't be positive about it; rather think he did. Then he said that Mr. Stephen and Mr. Smith were related. I do not remember whether he said Mr. Stephen and Mr. Smith were cousins; but they were related, anyway. He told me who Mr. Stephen was.

I remember Mr. Kittson saying, and I think that was in connection with the cut-off, that he could get a large amount easier than he cou'd get a small amount. There was no sum stated as to what he could raise.

When Mr. Kittson told me that I could assure Mr. Farley that there would be no trouble about the money matter, he hadn't been advised by me, at least, as to the probable amount of money that would be needed; I don't remember of having figured that up; still, I may have done so, or he may have done so; I don't remember now. (399.)

I saw Mr. Farley after this second interview with Mr. Kittson alone; I think that was the next Sunday; I know it was Sunday morning, and Mr. Farley and I were having a general talk.

I don't know that I told Mr. Farley that there would not be any harm in it. My recollection is, that after I had had some talk with Mr. Farley, and he spoke about wanting some home influence here, and the trouble we were all having on account of the Dutch being non-residents, and that they had better give away some of their securities to the right kind of men, then I made these remarks to Mr. Farley. He had come to the conclusion then that there was no use in talking any more about the Dutch furnishing the money to complete this line and put things in shape.

I asked him what harm there was in it and whose business it was. I was watching for a chance to talk to Mr. Farley to get Mr. Farley to consent to meet Mr. Kittson and Mr. Hill. I don't know as there was anything particular that prompted me to say that. I didn't suggest to Mr. Farley that there would be any harm in it, "Whose business is it, and what harm is there in it"? that is my recollection, that I made some remark of that kind; that is the substance of it. (400.)

I think Mr. Farley made the remark that it will take some money to buy these bonds. I think that was the remark that he made. I think that was the first that was said about any money.

That was after Mr. Farley commenced figuring. That was after they had pretty generally talked the whole thing over.

As to what would be done if they didn't get the majority?

I wouldn't state positively, judge, that there was anything said about that. Still, I do have an indistinct recollection of something being said, that, if they didn't get the majority of those bonds, they were good property anyway. I would not

want to be positive about that. They did say what they would do if they got the majority,—if they got the majority of the bonds. Mr. Farley then had a good deal of talk about that—what they would do then—that if they couldn't buy the Litchfield stock, they would go on and foreclose. They would take the place of the Dutch bondholders. (401.)

My understanding was that the Litchfields owned the majority of the First Division stock.

The extension line stock—I don't remember about that. I will not undertake to state that in detail now.

I don't know positively. That was a mixed up arrangement. I dont know whether the First Division Company owned those extension lines stocks, or whether it was the Northern Pacific Company, or whether it was Moorhead and Cass, as individuals. I haven't thought of that for a long time, but since you have asked that question, I am inclined to think that the Northern Pacific owned most of the stock. I will not be positive about that.

From time to time Mr. Kittson and Mr. Hill used to come down to see Mr. Farley and go through my office into his.

Sometimes they would close the door, and the clerks would come out into my office.

My recollection is, it was Samuel J. Beals and John Knuppe. I think they were in Mr. Farley's office.

Sometimes they went farther, and went into the little room off of the treasurer's office.

I couldn't swear positively that they always went into that little room; but I know they went there sometimes, because I have interrupted Mr. Farley with matters while he would be in conversation; and then I knew in a general way that they went there, besides.

The railroad that was built from Crookston to Fisher's Landing on the Red Lake river, my recollection is that was built in the summer of 1875. We furnished the ties and iron, and Mr. Kittson paid the labor bills. (402.)

My recollection is, I say, Mr. Kittson furnished this money —I presume it was the Red River Transportation Company's money. I won't be positive about the date, but I think when we first commenced to talk about building the cut-off, I think Mr. Kittson had some of his friends organize a railroad company. I think it was the Red River Valley company. I know that in our talk with Mr. Kittson it was organized so that we could build a road most any place in the Red River valley,

and when we built this spur from Crookston down my recollection is it was understood that the receiver loaned these ties and these rails, and that they were to be returned when called for, and that it could come under this organization. I will not be positive that it was built under this organization; but that is my recollection. We took a few of the ties from Glyndon, but I know we took up some of the ties that was laid in the track north of Crookston, because I was there and bossed the job of having them loaded onto the cars.

I don't remember whether De Graff claimed those ties, or whether he paid him for those ties that time or not. I know we used some of those ties afterwards when we did build the cut-off. I will not say positively that we used a single one of those ties in 1875. (403.)

This closed the cross-examination of Mr. Fisher. (403–4.)

On re-direct examination only five questions were asked him. He said (404):

After the building of the spur track from Crookston to Fisher's Landing, that spur track was used and operated by the receiver only, until the foreclosure sale of the Extension line property. (404.)

Mr. Fisher Recalled.

After defendants' evidence was taken, Mr. Fisher was recalled on rebuttal by complainant, and testified that in some of the interviews with Mr. Kittson he made the statement that they (Kittson and Hill) had looked into the Branch Line matters once, with the view of purchasing the Branch Line and building from Sauk Rapids to Brainerd (in re Delano's enterprise), but when they came to look into it, it was so mixed up they decided to have nothing to do with it. (1,653.)

Later matters of 1878, 1879 were inquired of. (1,654–5.)

The letter Farley to Kennedy & Co., of July 17, 1875, and the "statement" mentioned therein (Ex. 213, 214, 1,706–7) were identified and introduced. (1,656–7.)

The letter defendants' counsel had introduced while Mr.

Farley was defendants' witness, written by Mr. Farley to Barnes, June 3, 1876, (Deft's. Ex. 139, p. 1,492) was shown to Mr. Fisher. (1,657.) He was asked to examine the same and state whether, upon such examination, he could fix any more definitely than he did in his testimony last autumn the date when the conversation occurred between Mr. Kittson, Mr. Hill, Mr. Farley and himself, of which he testified last autumn.

To this Mr. Fisher replied:

The statements in that letter convince me that those conversations were had before the letter was written.

I would not undertake to give the date, but it must have occurred between the time that Mr. Farley took possession of the First Division and the time this letter was written. (1,658.)

No cross-examination of Mr. Fisher was made in the light of the newly discovered letters of 1876.

Mr. Fisher not Interested.

Instead of any cross-examination upon matters asked about on the direct examination, defendants' counsel attempted to show Mr. Fisher was interested in this cause, by having a direct or indirect pecuniary interest in the complainants' claims herein, against the defendants. (1,658.)

That attempt signally failed.

Mr. Fisher testified:

I know a Mr. Stout of Dubuque. Henry L. Stout of Dubuque is my uncle; yes, sir.

I think Mr. Stout has been a friend of Mr. Farley's for several years; yes, sir. I think it was Mr. Stout that introduced me to Mr. Farley years ago.

I do not remember any interview or conversation between myself and Mr. Stout and Mr. Farley where matters relating to this suit were spoken of. I have no recollection of it. (1,658.)

I do not know anything about any papers being placed in Mr. Stout's hands; that is, in connection with this case.

Do you not remember the making of a paper between yourself and Mr. Farley in relation to this suit, and the placing for safe keeping in the custody of Mr. Stout? No, sir; that never was done. The only paper in connection with this suit that I ever placed in Mr. Farley's hands was a statement for his attorney when he first commenced this suit, stating the facts that I knew in this matter—the same that I testified to.

Did you not make with Mr. Farley, and place in the hands of Mr. Stout, an agreement in respect to what interest you should have in this suit, and what you should do towards aiding in the prosecution? I did not; no, sir.

Did you not make and place in the hands of any other person any such agreement? No, sir.

C. Q. 13. Have you at any time had any agreement or understanding with Mr. Farley as to any interest you should have in the outcome of this suit? I have not; no, sir.

Have you not contributed means to aid, or furnished Mr. Farley or for his use means to aid in the prosecution of this suit? Do you mean testimony? I have testified here, but never have furnished Mr. Farley any money or anything of that kind in the prosecution of this suit.

Have you made any payments towards defraying any of the expenses of this suit?

A. No, sir. (1,659–60.)

You have mentioned a memorandum which you furnished Mr. Farley, or his counsel, in reference to the matters in this suit. To what person did you deliver that memorandum?

A. I am not positive whether I gave that to Mr. Farley or to Mr. Griffith. Mr. Griffith I think was his original attorney in this case.

I don't remember the date, but I think Mr. Griffith came to St. Paul with Mr. Farley just before he commenced his suit, and he questioned me as to what I knew about this matter, and I think he asked me to pencil off a memorandum of the facts—as I understood them—and I did so; but I don't remember whether I gave that memorandum to Mr. Farley or to Mr. Griffith.

That was before there was any litigation commenced at all. (1,660.)

That cross-examination concluded with a few questions as to later matters of 1877 and 1878. (1660–1.)

No attempt was ever made to follow up the supposed interest of Mr. Fisher in the complainant's claim in this suit.

We submit, in view of the constantly repeated and unfounded insinuations, made by counsel in the court below, particularly in their brief there filed to the effect that this suit was not begun for any other purposes than blackmail—the attempt by such questions to throw suspicion upon Mr. Fisher was a weak and reprehensible affair. Not to follow up any information, defendants had, if they had any whatever, on that point, after Mr. Fisher's examination was closed, seems to us a confession that their slurs and insinuations are absolutely groundless.

Resume of 1876.

Mr. Fisher and Mr. Farley testified as above shown, that the matter of acquiring the bonds, and with them the railroad properties, was discussed and agreed upon early in 1876, and before the letter of June 3, 1876, was written.

Before March 16, 1876, Mr. Farley had taken possession of the First Division property, and had already been over the branch line; and on that day was leaving to examine everything connected with the main line.

(See letter to Kennedy & Co., March 16, 1876, produced by defendants, 1,493.)

Mr. Barnes did not arrive in St. Paul until March 25, 26, or 27, 1876. (Hill's evidence, p. 584.)

The correspondence shows the matter of acquiring the railroads was discussed with Mr. Barnes while at St. Paul at the end of March and in April, 1876. Mr. Hill testified that he and Mr. Kittson had interviews with Mr. Barnes on that subject during that visit. Mr. Hill testified on that point. (585.)

"Mr. Barnes was out here a long time.

Mr. Kittson, if I remember, and myself, had interviews with Mr. Barnes, during which we made him acquainted with what we wanted to do substantially, and we asked him if his firm, as the agents of the Dutch Committee, were ready to name a price at which they would sell the bonds controlled by them. Mr. Barnes replied that as matters then stood he didn't see his way to what we wanted, that is, to making us a price at which the committee would be prepared to sell. * * * Mr. Barnes stated that while the situation was as he described it at that time, that, later, it might possibly change; in which case he would be glad to hear from us, or we would hear from him. We were not able to get Mr. Barnes to fix a price at which the bondholders would sell their bonds during his visit to St. Paul in late March and early April, 1876." (585.)

The first documentary evidence in the record of date prior to 1877, in regard to the negotiation for the purchase of the bonds, written by anybody whomsoever, is the letter by complainant to John S. Barnes, of June 3, 1876, which plainly shows complainant's connection with, and co-operation in the negotiation.

This letter, of which complainant took no copy, as already shown, was produced by defendants on their examination of complainant as a witness in their behalf, from the large mass of letters and papers turned over to them by John S. Kennedy.

The letter is as follows; (Defts.' Ex. 139, p. 1492.)

"ST. PAUL, June 3, 1876.

J. S. Barnes, Esq'r.

Major Thompson has spoken to me once or twice about refunding to Bishop Ireland the amount he paid for ¼ section land for town site near DeGraff. Shall I do it?

N. W. Kittson is getting anxious about the big operation of getting control of 1st Div., also Extension lines.

He can get the money. What do you think can be done?

You have his proposition in your memory.

I would again say to you, I think there is a big thing in Main Line 3 and 6 Million Bonds, at their present selling price.

Yours, &c.,

J. P. FARLEY.

Barnes' letter in reply is as follows: (C. Ex., 87; p. 252.)

NEW YORK, June 9, 1876.

J. P. Farley, Esq., General Manager, etc.

DEAR SIR: Referring to your letter of the 3d, regarding the refund to Bishop Ireland of the cost of one quarter-section land, I have no objection to it, and think it would be a fair equivalent for the bishop's activity in bringing in settlers. Did he pay cash or bonds? If in bonds, he should be paid the cost to him of the bonds used in payment.

I have constantly in mind my conversations with Mr. Kitsen and Mr. Hill, and have had much talk with Mr. Kennedy about it. Matters are so complicated, that at this time we do not see a clear way to the desired object; but as matters progress, we hope to do so—when the time comes, and the way seems at all clear, I will confer with you regarding it.

Yours, very truly, J. S. BARNES.

That letter was followed by one written ten days later, as follows (253):

(Personal.) NEW YORK, June 19, 1876.

MY DEAR MR. FARLEY: I enclose you a letter from Mr. Carp regarding Mr. Knuppe. Inasmuch as our friends in Holland do not call upon us a great deal, I think we should meet their wishes in this respect—give Mr. Knuppe pay from the time he left home at $100 per month, and find him something to do at that rate. You can arrange it in any way that suits you. We both understand that this is an exceptional case.

I have much to say to you regarding matters that we have talked of with our St. Paul friends, Mr. Kitchen and Mr. Hill,

but shall defer it until I see you. Things are working in the right direction for what we both want; whether there are insurmountable obstacles or not, remains to be seen.

Glad to see earnings coming up, and hope for handsome remittances this month. The general success of all plans in which our clients, you and ourselves, are interested, will depend greatly on what we accumulate here in cash this summer and fall. This, so far as management is concerned, is the main thing to do. It may be that, if I cannot get to St. Paul next month, I shall ask you to run on here for a few days.

Glad you have taken care of Mr. Peake and Mr. Dulman.

Yours faithfully, JOHN S. BARNES.

P. S. Please return Carp's letter.

The next documentary evidence in the record in regard to the negotiation is a telegram (Defts.' Ex. 44, page 992) as follows:

Dated St. Paul 16, 1876.

Received at Western Union building, Broadway and Dey street, August 16th.

To Jno. S. Barnes, care J. S. Kennedy & Co., N. Y.

Will the bondholders' committee make an offer fixing the prices of each of the different classes of bonds controlled by them, upon which they will sell out entirely, and let foreclosure be made here. N. W. KITTSON.

To this telegram Barnes replied by telegraph as follows (Rec., 957):

August 17th, 6.

N. W. Kittson, St. Paul, Minn.:

Have written Farley on the subject to-day.

J. S. BARNES.

The letter of August 17, 1876, referred to, complainant had not in his possession, and could not find or produce it.

The next letter on the subject, also produced by defendant's counsel (Defts.' Ex., 140; Rec., 1,492), is as follows:

ST. PAUL, August 23, 1876.

J. S. Barnes, Esq.:

I leave town for a few days. I read your letter 17th to friend Kittson, he feels somewhat disappointed. The old gentleman has great confidence in the future of this property, if it could

be obtained for the present selling price of the bonds. His friends who is expected to furnish the money has unlimited control of Canadian politics. It might become a Canada project, but that would be a matter of no moment to you or me, if we could make some money.

Yours, etc., J. P. FARLEY.

The next active step taken in the negotiation for the purchase of the bonds was the introduction by Mr. Farley of Kittson and Hill to John Carp, member and representative of the Dutch Committee, during his visit to St. Paul in December, 1876, and interviews between those gentlemen at which the proposition of Kittson and Hill to purchase the bonds held by the Dutch Committee, was seconded and recommended by Mr. Farley.

This was testified to by complainant, (75-77), and by Mr. Carp, (460-462), and was not denied by Mr. Hill (811-812).

This matter of the negotiation with John Carp, is referred to in the letter of John S. Barnes, dated December 18, 1876. Complainant's Exhibit 108, (266), as follows:

(Private.) NEW YORK, December 18, 1876.

J. P. Farley, Esq., Receiver, &c.

DEAR SIR: I have your favor of 15th, requesting the record book of the First Division Company, for use in the suits in St. Paul, and I have directed Mr. Nichols to send it to you by the American Express to-day. * * *

We are on the lookout for Mr. Carp, who telegraphed us that he would leave St. Paul last Monday; but he has not yet put in an appearance. I suppose that he has made a very thorough investigation of affairs generally, and has been interviewed by all "our friends," and has heard me plentifully abused and criticised by our impecunious and litigious friends De Graff & Company, who seem bound to make every one their debtors, through courts, legislatures and general bullying.

I hope our friends Kittson and Hill have seen Mr. Carp, and have made him understand what their plans and purposes have been. For my part I never could see how those plans could be brought to any practical shape, and have thought that I didn't fully understand what they wanted to do exactly.

I could always see that the completion of the extensions to St. Vincent would make rather a strong competition, during the open months, with the Red River steamboats, and that the boats would suffer greatly, hence that Mr. Kittson's friends would find their account in exercising a control over the St. Vincent Extension. But beyond this, I have never seen my way in any conversation I have had either with Hill or Kittson.

* * * * *

Yours very truly,
JOHN S. BARNES.

The first negotiations with Kennedy & Co., and with Mr. Barnes, a member of that firm, as above detailed,—Hill's conversations with him in March or April, 1876,—Farley's letter of June 3, 1876,—Kittson's telegram of August 16, 1876,—Barnes' letter to Farley of August 17, 1876,—and Farley's letter to Barnes of August 23, 1876,—produced no immediate results.

Mr. Farley repeatedly testified that Barnes, in conversation with him as late as February, 1877, was very incredulous,—did not believe that Kittson and Hill could raise the amount of money required to purchase the bonds. And this agrees with Mr. Hill's statement:

"We were not able to get Mr. Barnes to fix a price at which the bondholders would sell their bonds during his visit to St. Paul in late March and early April, 1876." (585.)

THE CARP NEGOTIATION.

The negotiations which actually resulted in the purchase of the bonds were begun between Farley, Kittson, Hill and John Carp, upon the introduction by Farley of Kittson and Hill to Carp, during the visit of the latter to St. Paul in December, 1876.

The opening of that final negotiation, the introduction of Kittson and Hill to Carp, and the vouching for them by Mr.

Farley, so that Mr. Carp under his responsibility to the commttee, was willing to even seriously listen to their propoposals, has been already shown during the period of 1876, in the testimony of Mr. Farley. (77.)

Mr. Carp, as will be more fully shown in his testimony, had no confidence in the proposals made to him by Mr. Kittson and Mr. Hill, until Mr. Farley persuaded him that Mr. Kittson was a man of high reputation, and until Mr. Farley had made repeated assurances that those gentlemen would be able to fulfill their engagements. (461.)

Mr. Farley testified (95):

My recollection is that Mr. Carp remained ten, twelve or fifteen days, possibly not so long, on that first visit in December, 1876, but he was here some time. He returned to St. Paul in February, 1877, and remained about the same length of time —from ten to fifteen days.

There was a proposition made by Mr. Kittson and Mr. Hill about the latter part of January, being between Mr. Carp's first and second visit (95).

To the best of my recollection that first proposition was entirely discarded, and another proposition made in May, 1877.

(See proposition attached to Carp's deposition, dated May 26, 1877, p. 533.)

There was a good deal of correspondence about it, and, to the best of my recollection, in the month of August following the Dutch committee wanted a remodeling of that proposition (98).

On cross-examination, Mr. Farley was asked as to the proposition made early in the year 1877, "Do you know what that "proposition was?" He replied, "Substantially, I do think "I know what it was." When asked what it was, he replied:

"The proposition was to buy the property of the First Division Company. As Mr. Hill had so represented to Mr. Carp, he had no confidence in the lines on the far Red river, and the proposition was to buy the First Division Company's property

after the foreclosures, and they could give a perfect title. That is my recollection of it. (154.)

On further cross-examination, Mr. Farley answered that the proposition was in writing, that he had no recollection of seeing it since, and that he saw it before it was sent to Mr. Carp, and gave the above as his recollection of its substance. (153-4.)

Subsequently to that cross-examination of Mr. Farley, the deposition of John Carp was taken in this case, at Rotterdam, Holland, and the original proposition so referred to was produced; and thereby Mr. Farley was fully corroborated. (Ex. E., 529.)

The cross-examination continued as to Mr. Farley's correspondence with Kennedy & Co. (154-8); the subsequent Kittson and Hill propositions in writing to buy the bonds, showing Mr. Farley's intimate knowledge of the course of the negotiation to its close. (158-61.)

The first proposition in writing by Kittson and Hill, dated St. Paul, January 29, 1877, addressed to John Carp, care of J. S. Kennedy & Co., New York, was an offer to purchase the main and branch lines of the First Division Company, for $3,500,000 in cash, the bondholders to retain the land grant. (529.)

In regard to that proposition complainant received a letter in which occurred the following passages (277, 278):

(Private.) NEW YORK, Feb'y 6th, 1877.

MY DEAR FARLEY: I have troubled you with a good many long letters lately, which I hope you have received.

* * * * *

I have gone over Mr. Hill and Mr. Kittson's proposition to Carp with him very fully, and discussed it in all its points fully. I suppose you have seen it before it was sent. I don't think Mr. Carp has come to any conclusions in his own mind about it; but I think he is a little troubled as to the way he shall be able to convince his committee that the offer is one

which Mr. Hill and Mr. Kittson have the ability to perform, and he has asked me repeatedly how he can do this. Now I have personally the highest regard for both these gentlemen, and would take their word as soon as that of any men of whom I know so slightly; but except that I have a general notion that some Canadian gentlemen stand behind them, and who are able and willing to furnish the large sum mentioned, I can say nothing which adds strength to Mr. Hill's and Mr. Kittson's proposition, or is in the nature of the sort of guarantee that the committee might require. This may be an obstacle to the carrying out of our friends' plans, and you must judge whether or not it is best to suggest to them the advisability of having their proposition endorsed or guaranteed by the capitalists or well known moneyed men or institutions *which would give it the necessary amount of weight.*

* * * * *

We must make up our minds to the fact that from our Dutch friends we cannot expect to get any money now or at any time. They are willing to take a "back seat" with their securities and leave us to finance, on the basis of the property itself, for all that it may need in the way of extensions and improvements.

Yours very truly,
JOHN S. BARNES, J. S. K. & Co.

This letter of February 6, 1877, also dealt largely with the necessity and wisdom of building the cut-off road from Breckenridge to Glyndon; and was followed by others in the spring of 1877, written by Kennedy & Co. to complainant, tending to show that Kittson and Hill were then proposing through Mr. Farley to build the cut-off.

See letters of March 14, 1877; March 29, 1877; April 18, 1877; May 8, 1877, and May 12, 1877. (Exhibits on pages 279, 281, 282, 283 and 285.)

Mr. Farley continued (95–6):

My recollection is, Mr. Carp made a report after returning to his country.

(See report of 1877, pages 482–528.)

It related to the condition of the property out here, as he found it on his visit to America. As far as general under-

standing, the report was made in Dutch; but of course I couldn't read that, and the translation which I caused Mr. Knuppe to make for J. S. Kennedy & Co.; I didn't examine that thoroughly.

It was remitted to J. S. Kennedy & Co., as per request.

I visited New York a few days after the date of the letter to me from Mr. Kennedy, trustee, of May 15, 1877 (Ex. 124, 284), stating: "I am hoping to have the pleasure of seeing you here on Thursday, but as I leave town that evening for a days, I write this lest you should not arrive until after I have left."

The particular object of my visit at that time was to confer with them (John S. Kennedy & Co.) about the probabilities, etc., of raising money to build this cut-off from Barnesville to Breckenridge (96).

On May 22, 1877, Kennedy & Co., wrote to the complainant on that subject as follows:

NEW YORK, May 22, 1877.

J. P. Farley, Esq.

DEAR SIR: Will you please get Mr. Knuppe to translate Mr. Carp's report and send us a translation. We think it necessary for all concerned that this should be done at the earliest possible moment.

We telegraphed you to-day the purport of Mr. Carp's reply to our telegram, from which *we conclude that there is no longer any reason for standing in the way of Mr. Hill & Mr. Kittson's plans.*

Will you please see that the arrangement made with them covers our right to purchase the property at cost at any time, and, if bonds are issued, that the amount is such that the bargain will be a fair one all around, for them and for us. We shall rely upon you to have this matter put on a fair business footing.

Yours truly,
J. S. KENNEDY & Co.

Mr. Farley continued (96–7):

I had a running conversation with Mr. Hill and Mr. Kittson about that cut-off for months previous; and, as a matter of fact, their names were mentioned in connection with the raising of the necessary funds to build it; but certain complications about the title, every way, could not be satisfactorily arranged, and I didn't succeed in getting them to do anything.

What I said to Messrs. Kennedy & Co., Messrs. Kittson and Hill, and Mr. Kittson particularly—thought he could raise the money if a satisfactory contract could be made with the First Division property, and the St. Paul and Pacific road in the hands of a receiver—to give them such a guaranty as the investment would be profitable.

(See further correspondence on the subject, June 5, 1877 (286); June 8, 1877 (1,014); June 15, 1877 (287); June 27, 1877 (289).)

Simultaneously with the foregoing matters pertaining to the cut-off road, sometimes called the Link, the negotiation for the purchase of the railroads, and later, for the purchase of the bonds held by the Dutch committee, was progressing.

The first proposition of January 29, 1877, was in the hands of Mr. Carp until May 26, 1877. At that time the former offer to buy the First Division lines (made January 29, 1877), was withdrawn, and an offer made to the Dutch committee through Mr. Carp for the bonds, the figures offered being as follows:

[For] the bonds of the main and branch lines of the First Division of the St. Paul and Pacific Railroad Company and the extension lines of the St. Paul and Pacific company, held by your committee, as per your letter bearing date New York, February 28, 1877, that is to say:

$	675,250	of the $	1,200,000	issue	Branch	Line.
	796,000	" "	2,800,000	"	"	"
	1,264,000	" "	3,000,000	"	Main	"
	4,057,000	" "	6,000,000	"	Main	"
	12,000,000	" "	15,000,000	"	Extension	"

After a careful examination of the property, we have determined upon a valuation of the whole on the basis of which we are prepared to purchase the several issues of bonds (with all unpaid coupons attached) held by your committee as above specified, at the following prices:

for the	$1,200,000	issue	80	cents	on the	dollar	of face	of bond.
" "	2,800,000	"	20	"	"	"	"	"
" "	3,000,000	"	35	"	"	"	"	"
" "	6,000,000	"	40	"	"	"	"	"
" "	15,000,000	"	11	"	"	"	"	"

While we consider the above prices an equitable valuation for the respective classes of bonds, your committee may make such changes in prices as they think best, provided such change in prices does not increase the aggregate amount to be paid by us. (533.)

Concerning the failure of the expected arrangements with Kittson and Hill to build the cut-off road, and the pending negotiation by them with Mr. Carp under the offer of May 26, 1877, Kennedy & Co., wrote Mr. Farley, on June 27, 1877. (289):

(Confidential.) NEW YORK, June 27, 1877.

J. P. Farley, Esq.

DEAR SIR: Your favor of 22d duly received, which is very satisfactory as regards the position of Kittson and Hill. We could not understand that apparent alliance.

Mr. Hill has been here for several days, and we have discussed at length the propositions of himself and Kittson made to the committee, and which they have referred to us. Our views of the value of the 286 miles of road, First Divn., is that in ordinary times, and under such management as yours, they should earn about $400,000 net, with a fair prospect for increased business, particularly after building the cut-off. This would be 7 per cent. upon $20,000 per mile. Kittson's and Hill's offer is about $13,000 per mile for the 1st Division Lines, altho' they bid only for the bare majority of the bonds, which, if they carried the road, would make the offer about $10,000 per mile. We are inclined to advise our friends to take the matter into consideration, and have mentioned prices which would, in our opinion, be more in accordance with our ideas of the value of the property, altho' it cannot be expected that parties will buy these bonds except with a pretty sure prospect of a large profit; and except these Canadians, there would not be found persons ready to give any such sum in these times as is now offered.

The purchasers should, of course, assume all proper liabilities that have been incurred in behalf of the bonds, and should stand responsible for all matters that have been undertaken in their behalf. This it is difficult to get at, and we fear that to do so would involve a very long and heavy negotiation. We mention these matters so that you may know our general views, if Mr. Hill speaks of this on his return; but it is very important that the whole matter should be regarded as confi-

dential, & that the fact that any such idea was entertained should not be known to any one but yourself & Mr. Hill & Mr. Kittson.

We expect to see Mr. Scott to-morrow. Yours very truly.

J. S. KENNEDY & Co.

P. S. An important letter was sent by us to Mr. Scott, to your care. Please see that it is returned promptly, as it arrived after he left. (289.)

In the summer of 1877 numerous letters and cipher telegrams passed between the complainant and Kennedy & Co., relating to the negotiations then in progress, in which complainant was treated as a friend and assistant to Kittson and Hill, and his intimate relations with them were recognized.

The series of cipher dispatches, together with such translations of them as were preserved, in the year 1877, from Kennedy & Co. to Mr. Farley, pertaining to the details and course of the then actively pending negotiations for the purchase of the bonds were introduced (109–116), and are shown in the record. (322–8.)

On receipt of the cipher dispatches, translations were made and delivered to Mr. Hill, in the absence of Mr. Kittson, who was often away or not easily found. (117, Q. 337.)

In the letter of September 6, 1877 (303-4), the following passage occurs:

We are exceedingly anxious to meet Messrs. Stephens & Smith, and have telegraphed you repeatedly in regard to this. Your replies have not been been very clear to us, your telegram of to-day saying that they will meet us "there," when our inquiry was whether they would meet us here or in Montreal.

Inasmuch as the time for the acceptance of the proposition made by Kittson & Hill expires on the 10th inst., our friends in Holland have been cabling us, and in their letters urge our seeing these gentlemen before the 10th; and in so important a matter we have spared no pains to secure an interview, but up to the present moment we can only infer that you have seen them, and are in a quandary what to do, or what answer to make to the Holland parties. We have cabled you there-

fore again today, asking whether the meeting with Stevens, Smith and Kittson & Hill is arranged for Montreal on Saturday, and await your reply with some anxiety, as one of our firm must leave certainly by to-morrow morning, if there is any likelihood of our seeing them on Saturday. Meantime you do not say anything in regard to the request for an extension of the time."

The conference so requested was brought about. But before it was held several cipher messages were sent, viz:

August 21st (323, Ex. No. 173–4).

"Tell Kittson Hill committee of bondholders desires us to see George Stephen, president Bank of Montreal, & Donald Smith, regarding proposition. Can Kittson Hill arrange meeting; where & when?

J. S. KENNEDY & Co."

August 30, 1877, (324, Ex. No. 180–1).

" * * * Can N. W. Kittson & J. J. Hill arrange meeting with Geo. Stephens, Prest. Bank Montreal, Donald A. Smith, Com'r Hudson Bay Co. Prefer Montreal or New York, early next week as possible.

J. S. KENNEDY."

September 3, 1877 (325 Ex. No. 182–3).

" * * * Tell N. W. Kittson and J. J. Hill we desire to meet Geo. Stephens, President Bank of Montreal, and Donald A. Smith, and communicate result of meeting to committee of bondholders before tenth; if impossible to arrange meeting, ask N. W. Kittson and J. J. Hill to extend time for consideration proposition for term requested by John Carp, or until meeting can be held; reply by cable.

J. S. KENNEDY & Co."

September 6, 1877 (326, Ex. No. 189).

"Do we understand that meeting with Stephens, Smith and Vigor [Kittson and Hill—see Ex. No. 175, p. 324], is arranged for Montreal Saturday. Answer quick.

J. S. KENNEDY & Co."

On Saturday evening, about September 1, 1877, Mr. Kittson and Mr. Hill drove up to the residence of Mr. Fisher, in St. Paul, and Mr. Hill stated to Mr. Fisher that the Montreal parties were there, or would be there the next morning, and

wanted to go out over the road. They asked for a special train, and stated that they wanted to get an early start so as to go as far as possible and get back in time for them to go east the next night. Mr. Fisher was requested to ask Mr. Farley to join the party.

The trip thus arranged for was made. (98,349.

Mr. Farley testified that while on that trip he was asked many questions, and gave answers to the best of his ability and knowledge. (99.)

It is unnecessary to detail the circumstances of the conference at Montreal between Mr. Barnes and the members of the syndicate, which took place immediately after the latter were at St. Paul, and went out over the road in company with Mr. Farley; nor to follow through the steps of the negotiation while Mr. Stephen was in Europe, in the fall of 1877. That visit was a failure, so far as raising the necessary funds was concerned.

Mr. Farley continued (98):

I met Donald A. Smith and George Stephen—I first met them on the platform at our depot, and about the first of September, 1877.

To the best of my knowledge, they arrived in St. Paul on Saturday evening. My assistant, Mr. Fisher, came to my hotel late in the evening, and notified me that Mr. Stephen and Mr. Smith were here, and requested that I take them over the road on the following day—on Sunday—to examine the property; wanted me in person to go with them. Mr. Fisher notified me that he had made all the necessary arrangements for the train to be in readiness for me to take those gentlemen over the road.

I received such a telegram as is referred to in the letter of August 21, 1877, to me by Messrs. Kennedy & Co. (Ex. 143) stating: "We have just telegraphed you to get Mr. Hill to arrange a meeting between us and his Canada friends, to discuss the proposition for the purchase of the committee's holdings."

Upon the receipt of such telegram I communicated the con-

tents of it to Mr. Hill; don't recollect whether I saw Mr. Kittson on that occasion, but I did see Mr. Hill, and communicated the fact of receiving such a telegram.

On that train that Sunday morning over the said railroad property with me to the best of my recollection, were Mr. George Stephen, Donald A. Smith, and Mr. Angus, Mr. Hill and Mr. Kittson, I think, though I wouldn't be positive about that, but, I think, Mr. Kittson was on the train; those were the only parties that I recollect of positively.

Mr. Stephen said to me that their time was very limited, and they wished to go over the road as far as they could that day, and return in the evening; the train went as far as Benson; I ordered a first-rate dinner for all of them, and we took dinner and returned.

During that trip Mr. Stephen seemed to be the man that was prominent in wishing to obtain the information which they sought, and had a great deal to say, and many questions to ask, to all of which I answered to the best of my ability and knowledge; I recollect distinctly of Mr. Hill referring to me about many matters connected with the property—as to my opinion, the condition of it, etc., etc.

We returned from Benson, reaching St. Paul late in the evening; I do not not know how long they remained; my impression is a very short time.

On receiving the letter of September 6, 1877, to me from J. S. Kennedy & Co. (Ex. 147), stating: 'Inasmuch as the time for the acceptance of the proposition made by Messrs. Kittson and Hill expires on the 10th inst., our friends in Holland have been cabling us and in their letters urging our seeing these gentlemen before the 10th; and in so important a matter we have spared no pains to secure an interview, but up to the present moment we can only infer that you have seen them and are in a quandary what to do, or what answer to make to the Holland parties';—I had interviews almost daily with Mr. Hill about the matter of this negotiation, and communicated to him the contents of this letter as soon as it was received, and he could be found.

I was in the habit of receiving telegrams, and, as to the precise date, I couldn't state, but it was a very common occurrence for them to telegraph me by a cipher code that they had furnished me themselves. The language of their telegrams were governed by that cipher code.

On receiving the letter dated September 24, 1877 (Exhibit

149), to me by Messrs. Kennedy & Co., stating: "We telegraphed you on Friday last to ascertain whether Messrs. Kittson and Hill, or either of them, had returned to St. Paul, and received your reply the same day that they were still absent. The writer, Mr. Barnes, went with these gentlemen to Montreal on the 11th inst., and had there several interviews with them."

On the receipt of this letter, I presume by the due course of mail, as all other matters connected with this negotiation, I sought an interview with Mr. Hill (Mr. Kittson was very hard to find sometimes), and kept him fully posted on all this matter; what particular steps he and and I agreed should be taken on that occasion, I am not able to state.

As to the further expression in that letter, as follows: "What the committee now want is a cable message, which we will transmit if they will wire us authority, making the price for the several issues as stated in this letter"; and to the further expression in the letter: "Upon receipt from them of a wire, saying we authorize you to change figures, in accordance with your letter to Farley of September 24th, we will cable it to Amsterdam."

My recollection is that I made Mr. Hill perfectly acquainted, and he and I agreed.

Mr. Hill telegraphed these parties to answer the Dutch committee according to Mr. Barnes' request there.

About the date of the receipt of said last described letter, Mr. Hill and I had interviews on matters connected with this business very frequently.

After the month of September, 1877, and during the year 1877, I have no recollection of seeing Mr. Stephen that year, after the visit that I have mentioned here.

I was informed by Mr. Hill, soon after that, that Mr. Geo. Stephen had or would sail very soon to England and Holland, to raise the money necessary to carry out this understanding and proposition to purchase the bonds.

From the understanding from Mr. Hill, he remained in Europe several months; and in the month of November following, to the best of my recollection, I was in New York, and learned from Mr. Kennedy and Mr. Barnes that Mr. Stephen was still in Europe, and the Dutch committee was very ~~was~~ much excited over the failure of Mr. Stephen to raise the money to pay for the purchase, as per former agreement.

At about the date of my visit to New York in the latter part of 1877, and after my return from that visit, I had conversations with Mr. Hill in reference to the then pending matter upon which Mr. Stephen was or had been in Europe.

And I understood from him the same that I learned from Kennedy & Co.—That on account of complications in Europe, Mr. Stephen had failed to raise the money to pay for the bonds, as per agreement.

My recollection is that soon after that Mr. Stephen was expected to return, that Mr. Hill left for New York to consult with Mr. Stephen on his arrival and John S. Kennedy & Co. —they had the matter in hand then—for the prosecution of this purchase.

After his return Mr. Hill informed me that they had made a proposition to the Dutch committee looking to the purchase of the bonds on another basis entirely. They was to pay for the bonds after the foreclosures and reorganizations. I do not recollect what length of time, but it was to be after the reorganization. They were to be paid for after the reorganization.

(See proposal to that effect afterwards produced by Hill; D. Ex. 13, p. 913, made in January, 1878, 618.)

Mr. Farley was cross-examined as to matters in 1877 (155):

"As early as, I think the early part of February, '77, I received a letter written by John S. Barnes (I don't recollect how it was signed), discussing the matters of this proposition that had been made by Hill and Kittson to Mr. Carp, who was in New York.

My recollection is that we received a letter from them early in February, while Mr. Carp was in New York, and before he returned to St. Paul a second time, about the proposition of Hill and Kittson.

There was no particular correspondence came up until the month of June, to my recollection on the subject. They were trying to negotiate for these bonds through other channels—other parties.

My impression is, that the letter of February 6, 1877 (276), is the first letter I received from J. S. Kennedy & Company, after that negotiation commenced; that is my impression.

There was no correspondence sprung up of any great importance until the month of June following.

After the month of June, '77, there was a good deal of cor-

respondence between me and them on that subject, but I couldn't give the dates of it.

I think I received quite a number prior to the month of August.

The correspondence between Kennedy & Company and myself was a daily occurrence, and I have no recollection of the substance and contents of said letters between those dates.

I am inclined to think if I had no interest in the negotiation, I would not have bothered myself about those things at all. That is my impression now. It would be something that didn't interest me.

I think my interest in the property, purchase of the bonds, was an inducement for me to have anything at all to do with it. I do not think if it had not been for my interest that I would have been bothered with this business at all. Mr. Hill and Mr. Kittson both had offices here; could have been reached as easy as I could.

Well, sir, I didn't feel that there was anything remarkable in the circumstance. It didn't seem strange to me, because my interest with Hill and Kittson to me was known to be very plain; nothing surprising to me in connection with the matter.

I cannot conceive what connection it had with the duties and labors that was expected of me when I was hired to care for this property. Mr. Hill had been in New York frequently, and it was understood between me and Mr. Hill, and I think that he did so tell me, that he instructed them to make all communications through me.

It would be pretty hard for me to answer that question, sir—what they (Kennedy & Company) thought about it.

They were received through me, with Mr. Hill's consent, and I supposed Mr. Hill had so instructed them to make those negotiations through me to him and Mr. Kittson. I don't know any other reason why they should do it.

Outside of this transaction of purchasing the bonds, I have no knowledge of their communicating anything to me; only in regard to the operation of the property,—the care of the property out here.

The passage in the letter of John S. Kennedy & Co., of June 27, 1877, ("Exhibit No. 132"): "Mr. Hill has been here for several days, and we have discussed at length the proposition of himself and Kittson made to the committee, and which they referred to us," I understand refers to the proposition that Mr. Hill and Mr. Kittson had made to purchase the bonds of the Duch committee.

I think, to the best of my knowledge, that proposition originated in May, 1877, and somewhat remodeled in the August following.

As I understand it—as I recollect —that proposition was made in May, and it had reference to the negotiation then pending between Mr. Hill and Mr. Kittson for the purchase of the Dutch bondholders' holdings.

To the best of my recollection, this negotiation, up to this time, had been made through Mr. Carp, a member of the Dutch committee, commencing on their first acquaintance in November. That this matter had been formally brought before the whole committee, I do not know.

As to Mr. Stephen's purpose in going to London.

As I understood it at the time, sir, he went there expecting to carry out this arrangment, and expected to raise money through the Bank of London.

In 1877, through Mr. John Carp, of Utrecht, Holland, I bought some of the bonds, other than the extension line bonds, on my own account and that of Major Day, of Dubuque. As I recollect, that was in the three and six million bonds (169). Major Day, as I recollect, left $10,000 with me and I possibly added an equal amount of my own money. I had no bonds but what were purchased by Mr. Carp, considered outside bonds. (170.) I think the purchases extended through the summer of 1877. (171.) I never kept any book account thereof. I was never interested in any other outside purchases of bonds. The certificate I held on the branch line was sold for me by Kennedy & Co., and the others to parties buying lands with them. (172.) I sold some to R. H. Wellington.

The bonds I sold through Kennedy & Co., were sold either in 1877 or 1878. I do not remember which year. (173.)

I have no recollection of buying or selling any bonds through H. P. Upham. (174.)

The profit was very satisfactory to both Major Day and myself; made some money on it; I think Kennedy & Co. reported their sales to me by letter. In the general office we had a fire that burned up a good deal of our correspondence; I could not tell where that letter is. (176.)

Cross-examination closed.

John Carp's Testimony.

In Mr. Carp's deposition, taken at Rotterdam, Holland, (after Mr. Farley and Mr. Fisher had testified), he testified (457–463):

I know Messrs. Norman W. Kittson and James J. Hill. I made first the acquaintance of Mr. Hill. Mr. Farley introduced me to him a morning in December, 1876, at the depot of the railroad. To Mr. Kittson, Mr. Jesse P. Farley introduced me afterwards, as being the person who wanted to buy the bonds which were under the control of the Dutch committee.

Mr. Jesse Farley introduced me to both gentlemen.

Int. 13. Please state whether or not during your visit or visits, if any, to the State of Minnesota during the years of 1876 and 1877, you had any conversation or conversations with said Norman W. Kittson or James J. Hill, or either of them, in relation to the sale of the bonds or property of said two railroad companies?

A. I had two or three meetings with said gentlemen on this subject.

The several complications and litigation about the affairs of the said railroad companies had caused a heavy depression on all the classes of bonds of the said railroad companies, the owners were very anxious that matters should come to a result, and the committee, who, under these circumstances, was unable to raise the means to finish the roads, pressed upon me to try to obtain some compromise with the different parties It was a most difficult position, and I talked many times about all these questions with Mr. Jesse P. Farley, who related to me the various difficulties we were to meet from competing railroads and opposite parties, urging strongly upon the necessity to finish the building of the roads, which at that time was almost impossible for the committee to do. I was induced to believe that it would last many years before all these troubles should come to an end. Under these circumstances, I felt inclined to entertain a proposition to sell the bonds which were under the control of the Dutch committee, and upon Mr. Farley's question if the Dutch committee would be willing to sell these bonds, I replied that I believed people in Holland would be willing to sell out, if a reasonable and fair bid could be obtained.

Mr. Farley said such people, who would buy the bonds, could be found in Minnesota, which I doubted, however, but some time afterwards he said he could introduce me to men who would buy the bonds, and so he introduced me to Messrs. Norman W. Kittson and James J. Hill. I believe Mr. Jesse P. Farley was present for a while at the first interview, but afterwards I had an interview with said gentlemen at the office of Mr. Norman W. Kittson. It was Mr. Farley who brought me in at said office, as I ignored where it was.

In these interviews I stated several times that the committee had no authority to sell the bonds without the assent of the certificate holders. The committee could only advise, but such advice was almost certain to be followed. I further stated that I was not authorized to name any price for these bonds; that they certainly could not be bought at their quotation at the Exchange of Amsterdam, this quotation being merely a nominal price for a few bonds, but if they would name me a price, and I thought this price was reasonable and fair, I would lay the matter before the committee.

I had, however, no confidence in their proposals, and told so to Mr. Jesse P. Farley, who persuaded me that Mr. Kittson was a man of high reputation in the state and of much influence, having close connections with strong financial men in Canada. Upon Mr. Farley's repeated assurances that these gentlemen should be able to fulfill their engagements, I got more confidence and looked more seriously upon the matter.

I had great confidence in Mr. Jesse P. Farley and stated so many times in my reports, this was not only from my private impressions, but especially as Messrs. John S. Kennedy and John S. Barnes of New York, always spoke to me in the highest terms of Mr. Farley's honesty and ability. I had many conversations with Mr. Jesse P. Farley about the value of the different classes of bonds, and enquired what was his opinion about their present and future value. (Rec., 460–462.)

All the correspondence and dispatches with reference to the negotiations were produced by Mr. Carp, and, together with his reports to the bondholders in Holland, in 1873 and 1877, are in the record. (462, Int. 15; 466, 452.)

Mr. Carp, as the representative of the Dutch committee, of which he was a member, had visited America and St. Paul several times during the period from 1873 to 1877, inclusive,

and had made thorough investigation into the affairs of the St. Paul and Pacific and First Division Companies. After his visit in 1873, and again in 1876-7, he made careful and exhaustive reports to the committee of the condition and prospects of the property. (466, 483.)

He was thoroughly informed as to all matters connected with the railroad lines, completed and uncompleted, the bonds secured by mortgages upon them, the legislation in Minnesota concerning the land-grants, the financial depression which existed in regard to railroad building, and all other matters necessary to enable him to judge of the course of action most likely to advance the interests of the bondholders. Through him and his reports the committee received the same information.

There can be no doubt that his best judgment finally was, in view of the inability or unwillingnes of the bondholders to advance the money required to complete the extensions, and thus save the land-grant from forfeiture, that their best course would be to sell their bonds; and that the committee were largely guided by his opinion.

Mr. Farley—For Defendants.

In his deposition for the defendants, Mr. Farley, as already seen, corrected his statement of his recollection as to the first conversation with Barnes about Hill and Kittson's buying the bonds, having been in February, 1877. (1,350, Q. 8, and 1,356, Q. 33, corrected after the letter of June 3, 1876, was produced; see 1,372, Q. 92, 94.)

Mr. Farley testified:

Even in February, 1877, in talking with Mr. Barnes, he laughed at the idea of Kittson and Hill buying the bonds. (1,374.)

In 1877 I built thirty-three and one-half miles of road between Breckenridge and Barnesville (the cut-off road) for

$6,300 or $6,500 a mile on the Red River. (1,441.) I do not recollect what value I placed on the lands, or the completed or the extension lines, in January, 1877. (1,442-3.) I should judge about $10,000 a mile for the completed lines, and $2 per acre for the lands. I do not know that I ever made any particular estimate for the franchise alone. (1,445.)

As to the terminal facilities in St. Paul at that time, January, 1877:

"As I recollect the terminal facilities in St. Paul at that time, it was all very low land except certain tracks that had been built over it; and for additional facilities at that time we had to fill from the bluffs above, and we carried debris from the city; my custom was to pay ten cents a yard to have this hauled to fill up the property; and at that date there was no man who could see through the future in my opinion, nor put a very extraordinary price upon those facilities as they were situated; and yet they were the best in the city; better than any other railroad had. (1,449.)

They are very valuable indeed, now. (1,450.)

In July, 1877, as I now recollect it, I had a very depressing feeling in regard to the prospects because the grasshoppers had eat up everything we had to ship in the future. They commenced in June.

The grasshopper depredations to some extent commenced the fall before and did a little damage to the crops, but not to a very alarming extent; but they remained in the country and laid their eggs in the ground that fall, 1876, and in 1877, if my memory serves me, as soon as the wheat and oats and other small grain was somewhat developed, the grasshoppers eat it all up.

As you have mentioned that fact, I lost sight of it, but that was the fact in 1877, the Northern Pacific building a line from Brainerd, occupying what I conceived to be the property of the bondholders, iron and grading, bridge timber, etc., which was very annoying to me, very annoying. I thought it was a complete confiscation of the rights of the Dutch bondholders, but how much it influenced my mind in regard to the value of the property, I couldn't say now. It was very annoying, however. I thought of it a good deal and said a good deal about it." (1,453.)

W. H. FISHER.

Mr. Fisher testified (348):

"After the conversations with Messrs. Kittson and Hill in 1876, with reference to the same subject-matter, I had other conversations with them. I think it was in the summer of 1877. It was during the time that these negotiations were going on; a good deal of telegraphing going on. I used to take telegrams that would come to Mr. Farley in cipher, and translate them by a cipher code that he had that was in use by Kennedy & Company, and him, in their correspondence. When Mr. Farley was there, I would give them to him. When he was not there, I would write them off, and take them up to Mr. Kittson.

I took a telegram of that kind up to Mr. Kittson; and, after I had been back to my office about an hour, he sent for me. I went up to his office, and he and Mr. Hill were there together. They had written out an answer to that telegram, and wanted me to sign Mr. Farley's name to it and send it. Mr. Farley was in Dubuque at the time, and I suggested the propriety of transmitting the telegram to him, and the answer that they wanted to send, and see if he approved of it. Mr. Hill spoke up and says: 'This thing wants to be done right away;' and Mr. Kittson says: 'This thing wants immediate attention, and you know it is all right. You know Mr. Farley is just as much interested in this as we are.' I signed Mr. Farley's name to it, and sent it, and showed it to him on his return, and it was all satisfactory.

In the latter part of August or the early part of September, 1877, I was living on Franklin street, between 4th and 5th. I forget the number now, but it was in one of Mr. Bettinger's houses. On a Saturday night I had just got into bed; it was about nine o'clock, or a little after, possibly. I had been out over the road, and lost a good deal of sleep for a couple of nights, and went to bed early. Just as I got to bed the door bell rang. I partially dressed myself, and went down to the door, and Mr. Hill was there. He stood at the door and Mr. Kittson sat in a buggy—Mr. Hill's buggy, right opposite the gate. Mr. Hill says: 'These Montreal bank folks,' and either said, 'they are here,' or 'they will be here to-morrow morning;' I will not be positive which; and 'they want to go out over the road.' 'We want you to have a special for them, and we will get an early start, so as to go as far as possible,

and get back in time for them to go east to-morrow night.' And he says: 'I want you to see Mr. Farley, and have him down there to go along.' I says: 'All right, I will have to go over to the shops;' and he says: 'Dress yourself, and get right in the buggy with us.' I did so. I got in the buggy with them; we drove down to the Merchants'.

Mr. Kittson got out at the Merchants' hotel, in this city, and Mr. Hill took me over to the shops. I called the foreman up, and gave orders for the engine and car to be ready. Then I come back. I cannot locate the place exactly, but we came back to where Judd Rice was boarding; it was in a large brick house, pretty near up to the top of Jackson street—somewhere in there. I knew where he boarded. We called to him. It was a warm night, and his window was up. He came to the window and I told him about the special train, so he could get his conductor and brakemen, and have them ready. Then I came back to the Merchants' hotel. I got out there, and told Mr. Hill I would walk home from there. I bid him good night, and he says: 'Be sure and have Farley there, now, because we will have to depend on him to explain everything.' I then notified Mr. Farley. He said he would be there; and the next morning—Sunday morning—I went down to the depot. Mr. Farley got there about the same time I did; and Donald A. Smith and George Stephen and Mr. Angus, Mr. Kittson and Mr. Hill were there, and they all got on the car with Mr. Farley, and went out over the road.

My recollection is they left Sunday night.

Subsequent to that time—it was in the winter of 1877 and '78, I think—there was an article appeared in the paper here. I am not sure, but think it was the Pioneer Press. It went on to state that certain parties here—I think it mentioned Hill and Kittson's names as purchasing this property; and I met Mr. Kittson and Mr. Farley.

They were talking about this article and Mr. Kittson said it was given away by Mr. Hill. He said they couldn't hold the fellow anywhere. That the thing was not all closed up yet; and he was afraid it might do some harm in the negotiations; and Mr. Farley told Mr. Kittson that they ought to have some charity for Mr. Hill; that he had a good many good qualities; that he would hang on like a bull-dog; that 'if it hadn't been for Mr. Hill's hanging on here, you and I would have got discouraged, and given the thing up.' Mr. Kittson says: 'Yes, that's so. You and I will have to work together, Mr. Farley, and try and hold Jim level.'"

Mr. Fisher testified to the copies of the translation of the cipher dispatches of 1877. (353–4; 323–5; Exs. 174–7–81–3–5–8–96.)

On cross-examination (363):

I would not undertake to say which telegram it was (to the answer of which I was asked to sign Mr. Farley's name), but I remember the circumstance perfectly well. Mr. Farley was in Iowa, and when this telegram came, I translated it and took it up to Mr. Kittson's office, and I will never forget it in the world. When I went back there after Mr. Kittson sent for me, I found Mr. Kittson and Mr. Hill there, and when I suggested the propriety of transmitting this telegram and the answer to Mr. Farley, Mr. Hill spoke up first to call my attention to the fact that it wanted to be attended to right away; but Mr. Kittson spoke up in a manner that he never had spoken to me before or since. Mr. Kittson has always treated me with the greatest courtesy and kindness until that time, and he turned around to me and said: "Damn it, you know that Mr. Farley has got as much interest here as we have. You know it is all right, and it wants to be attended to right away." This is the language that Mr. Kittson used. I believe it is word for word; the only time that Mr. Kittson has ever spoken to me, except in the greatest kindness.

(Mr. Fisher could not identify from those shown him the particular telegram referred to. 364–7.)

Sir George Stephen.

As to the visit by him to England in the fall of 1877, in pursuance of the negotiation for the purchase of the bonds, George Stephen testified:

"It was understood that if we succeeded in getting the Dutch committee to agree to take the price for the bonds that we had determined upon, that we should endeavor to find the money in London, to pay for the bonds. (1,231, Q. 39.)

"We decided then that I should endeavor to borrow the money in London to pay the Dutch committee for their bonds, and in that way, or by getting control of their holding of the bonds, to obtain control of the property through the foreclosure proceedings."

If the Dutch committee agreed to sell at these prices, the next step was to find the money to carry the bargain out. (1332.)

About the last days of September, 1877, I left for England. Shortly after arriving in London I went over to Amsterdam, and saw most of the committee. I made application for money to capitalists in London.

What I proposed was this: I said, here is an enterprise to carry through, which requires an advance—I think I named the sum of eight hundred thousand pounds. If you will advance this money to Sir Donald Smith, myself, Mr. Kittson and Mr. Hill, we will give you all the security we are able to furnish, in addition to security upon the bonds to be purchased; in other words, that the loan would be a loan to us four gentlemen, and we should agree to pay interest on the advance—I think I mentioned at the rate of five per cent; and further, in consideration of your making this loan to us, we will give you an equal interest with us in the final outcome.

After considerable negotiation, I utterly failed. Nobody believed—or at least I failed to induce anybody to believe—that the property was good for anything.

About Christmas, I think, I returned to Montreal; I think I arrived at Halifax the day before Christmas.

The negotiation was practically at an end.

Of course, I met Sir Donald Smith here (at Montreal), and I think also Mr. Kittson and Mr. Hill, but my memory does not help me as to that.

I went from here to New York, after my return from England, the 2d or 3d of January, 1878, I should think. (1237.)

I first met Mr. John S. Kennedy on that first visit to New York.

Fresh negotiations were immediately commenced upon an entirely different basis. As the result, the agreement of March 13, 1878, between Donald A. Smith, George Stephen, Norman W. Kittson and James J. Hill with the Dutch committee was entered into." (1,238.)

(See Defendants' Exhibit 122, p. 1,301; and stipulation 1,507, that the copy attached to the answer, p. 35, shall stand in place of the Exhibit 122.)

JOHN S. KENNEDY.

Mr. Kennedy, on cross-examination, testified at Berne, Switzerland:

"I remember that in the autumn of 1877 the Dutch committee considered that a sale had been effected between themselves and Kittson and Hill and others, who either were then or they expected to have associated with them, of the latter of whom Mr. Stephen was one. But it finally turned out that what the committee had considered an offer, and which they either had accepted or intended to accept, to wit, the communication of Kittson and Hill to them was found not to be an offer in point of fact, but a request for an option on the bonds for a specified period, or something of that nature. (1,620–1.)

As to that offer or option being one which was to expire at the end of sixty days, or some date fixed—I do not now remember the terms of it, but I think it was something of that character. The consent of the Dutch committee and the bondholders to the proposition was obtained and made known to Kittson, Hill and associates. As nearly as I can remember I think it was sometime in October, but it may have been sometime early in November, 1877." (1,621.)

Article 4 of the agreement of March 13, 1878, provided:

"During the pendency of said foreclosure suits and until the payment of the full contract price of the bonds purchased and sold under this agreement, the said parties of the first part shall pay to the said J. S. Kennedy & Co., agents for said committee at the city of New York, upon the 22d days of June and December in each year, a sum in gold coin equal to the semi-annual interest upon the gross purchase price of said bonds as specified to be paid in cash, computed at the rate of 7 per cent per annum thereon, said interest to commence to accrue, upon said purchase price, from the 22d day of December, One Thousand Eight Hundred and Seventy-seven." (36.)

The proposition of May 26, 1877, sent by N. W. Kittson and Jas. J. Hill to John Carp, for the committee, stating the prices at which they were prepared to purchase the bonds, contained the following clause:

"In case, therefore, your committee is prepared to sell us

the bonds on the terms above mentioned, we shall require 60 or 90 days (the latter if possible) after receipt of advices from you to that effect, in which to take the necessary steps for completing the transaction by closing the bargain and obtaining the necessary funds to pay for the bonds." (533.)

Attached to Mr. Carp's deposition (539) is a translation of the address, or advertisement, of the Dutch committee to the bondholders, dated February 8, 1878, stating the then situation of the negotiation for the bonds. In that address, top of page 540, it is stated:

* * * "In consequence of these communications the agents have in the first place deliberated with their legal advisers if, and to what extent a lawsuit against the defaulting parties would furnish practical results, and such lawsuit being found inadvisable for many overweighing reasons, the agents judged most preferable not to reject the new negotiations which the American-Canadian-Combination wished to enter into, without, however, releasing the parties formally from the previous agreement."

And further, (top of page 541):

"The obtained increase in the purchase price, joined to a premium of 25 per cent in preferred shares, if the payment is offered or desired by the purchasers in bonds at 90 per cent, without premium in preferred shares; all this in connection with the rate of interest at 7 per cent per annum in gold, on the purchase sum, from 22d December, 1877, until the day of final payment, offers an ample equivalent for the loss of payment of the purchase sum, *at the formerly agreed time.*"

Premature Newspaper Articles.

Mr. Farley's attention was called by his counsel to the letter to him of February 18, 1878 (Comp. Ex., 161, p. 317), from Kennedy & Co., stating:

"We notice the newspaper articles in regard to the sale to our friends in Canada and St. Paul. They are premature, and we hope they will not delay or interfere with the negotiation, which, as you know, is still progressing."

And Mr. Farley was asked if, at about the date of that letter, he had any conversation with Mr. Kittson with reference to to the then pending negotiation. Mr. Farley answered:

I had. Mr. Kittson called upon me and asked me if I had seen the article in the newspaper referring to this purchase of the bonds of the Dutch committee. To the best of my recollection I had not noticed it. The old gentleman seemed to be quite excited over the matter, and said that this thing had proceeded from "Jim Hill," and something that he had been afraid of during the entire time that we were negotiating for these bonds; and seemed to think that it was very unfortunate, and blamed Mr. Hill for the whole of it. In reply to what Mr. Kittson had said I told him that I should look over any imperfection of this kind that Mr. Hill had committed; that this negotiation was pretty well settled and accomplished, and that "Jim," as we called him, was entitled to a good deal of credit for the energy and persistency with which he had pursued this matter; and called his attention to the fact that he and myself, during the long pending negotiation, had frequently been discouraged, so much so that we would have most likely abandoned the thing entirely if it had not been for "Jim Hill." That was the sum and substance of that interview, sir. There may have been a good deal more said, but that was the substance of it. (103).

After another question (Q. 258, p. 103) as to a later matter, Mr. Farley was asked:

"Q. 259. How soon after your conversation with Mr. Kittson with reference to the newspaper article mentioned, did the negotiation or business pertaining to the purchase of the said bonds end?

A. This newspaper article was on what date? I know the negotiation was considered almost closed, and the contract as signed by them will tell the tale precisely." (103.)

Upon cross-examination nothing was asked as to the episode of the premature newspaper publication.

Subsequently, when Mr. Hill was testifying, certain evidence was produced (telegrams from Mr. Kittson to him of February 12, 1878, March 3, 1878, and one from St. Paul to New York, March 16, 1878, Defts.' Exs. 17–19; pages 918–

919) tending to show Mr. Kittson was absent from St. Paul from February 12th to March 16, 1878.

Consequently, the conversation by Mr. Kittson with Mr. Farley as to the premature newspaper publication, must have related to some other publication than that in February, 1878, mentioned by Kennedy & Co. to Mr. Farley in their letter of February 18, 1878. (Defts.' Ex. 161, p. 317.)

A careful examination was made for such premature publications, and one was found in the Pioneer Press of October 26, 1877. (1433.) Mr. Farley's attention was called to it, and he, after having heard it read, (1433–6.) stated he was convinced that was the one about which Mr. Kittson complained to him. (1436–7.)

No attempt was ever made to show Mr. Kittson was not at St. Paul on and after the date of the article of October 26, 1877. No reason for its publication was ever given. Mr. Farley testified he did not inspire or cause the publication of the article. Mr. Hill never denied that he himself inspired it. He admitted that he did cause the article of February 12, 1878 (1462), to be published, and, indeed, stated probably very good reasons, for the latter article then appearing.

We should not now call particular attention to the newspaper episode, except for the fact that counsel being robbed of the contradiction of Mr. Farley, so apparently produced upon the record, indulged in a very voluminous cross-examination of Mr. Farley on the correction he had made concerning the said premature press article. Besides this, counsel in the court below laid great stress upon the point. We shall not now further discuss this question, except to point out the long, laborious and fruitless effort of counsel running through many pages of the record (1,455 to 1,471), to break the force of Mr. Farley's candid and reasonable explanation of his error in the date of the newspaper article which was so bitterly com-

plained of by Mr. Kittson. Two of Mr. Farley's answers will, however, be given in full:

"A. As I now recollect it this article in the paper and the one in February was right upon the heel—this one right upon the heel of the negotiations being closed, as we supposed when Mr. Stephen went to Europe to consummate the contract; and the other one coming out about the time that the last agreement was arranged, naturally was intended to lead me into an error, recollecting as I did at that time that there had been but one. What was in the October article, I can't recollect what it was now. Judge Young asked me to point out what was in the two articles. I do not recollect what was in the other, only from general report on the subject. (1,461, Q. 85.)

A. Now, Judge, I have tried the best I can to satisfy you that I must have been mistaken about that newspaper article, and I have explained it in every way, shape and manner that I know how, and cannot explain it any further. I think you are rubbing it in a little thick on my memory. I am willing to stay here all summer—but I have testified so often in regard to that very same question. (1,469, Q. 108.)

When we come to answer *seratim* the objections raised in the Circuit court below, to the evidence of Mr. Farley and Mr. Fisher, we shall again refer to this subject.

This closes the substantial and material occurrences of the year 1877; and it will now be in order to take up the negotiation for the purchase of the bonds, as it was renewed and continued, upon Mr. Stephens' arrival at New York, the 2d or 3d of January, 1878.

The Final Negotiations.

From the close of the period of 1877, which had seen so many fluctuations in the enterprise, the more direct conduct of the negotiation, so far as Kennedy & Co. were concerned, through the hands and mediation of Mr. Farley, was largely changed; and thereafter Kittson and Hill looked more directly to Kennedy & Co. and to Mr. Stephens' figuring with them, in shaping the general course of affairs. The failure to bor-

row the £800,000 in Europe, and the threats and disappointments of the committee, opened the way, or rather made it imperative that a way should be opened to buy the bonds substantially on credit—guarding always the interests, holdings and securities of the bondolders, co-operating with them, and they co-operating with the would-be purchasers, upon an intricate though safe plan—to transfer the legal title of the railroads to a new corporation, so that money could be gotten on new bonds to pay the price the Dutch people were so very willing to take for their holdings.

Influences of such a careful, considerate and skillful character were brought to bear on the difficult situation of January, 1878, (through the firm of John S. Kennedy & Co., the New York agents of the bondholders), that from the time those gentlemen took hold of the negotiation (as it was undoubtedly their duty to do in loyalty to their clients), the transaction so negotiated, directly in the interest of the Dutch bondholders, proceeded more rapidly and satisfactorily.

Indeed, at the early date of February 8, 1878, J. S. Kennedy & Co. wrote Mr. Farley: "We suppose the bond-"holders will now accept the offer of Messrs. Stephen and his "associates. The matter has progressed very rapidly and "satisfactorily since we took it in charge, and so far as the "negotiations are concerned, is well nigh concluded." (316.)

Though the correspondence from and after January, 1878 bears evidence that Mr. Hill at that early date began to lay plans and plots preparatory to resist and deny Mr. Farley's interest (jointly with himself and Mr. Kittson) in the enterprise, still, the evidence is very clear that nothing was done calculated to produce a rupture of the surface relations with Mr. Farley, and that Mr. Farley was still considered a very necessary party to the ultimate success of the enterprise. By a careful concert of action, no break in the relations of any of

the parties with Mr. Farley took place, until the time arrived when it was believed he was no longer needed.

The correspondence of the year 1878 is, moreover, full and clear to the effect that Mr. Farley's interest with Kittson and Hill was known to and approved by Kennedy and Barnes, the agents of the bondholders, and that Mr. Farley's mind was never disabused of the belief that all parties cheerfully acquiesced in his having such interest.

It is not pretended that Mr. Farley had any agreement whatever with Stephen and Smith, or either of them, whereby they were bound to accord to him any share in the enterprise, nor that any conversations ever took place between Mr. Farley and those gentlemen on the subject of Mr. Farley's agreement with Mr. Kittson and Mr. Hill.

So far as the record shows, neither Mr. Stephen or Mr. Smith were informed of Mr. Farley's claim and interest, until the visit of the whole party to St. Paul, just before the foreclosure sales, at a later date—in the spring of 1879. Mr. Kittson, who always enjoined and insisted upon strict secrecy as to Mr. Farley's interest, and Mr. Hill, who was the first to break with Mr. Farley at the end, possessed the intimate friendship and confidence of Smith and Stephen; and had it clearly in their power to keep from Mr. Smith and Mr. Stephen all knowledge that they (Kittson and Hill) had agreed to divide their two shares in the net profits with Mr. Farley. Whether Mr. Kittson and Mr. Hill ever did, as a matter of fact, disclose the full truth to their associates, Smith and Stephen, is quite immaterial. They were under no obligations to do so, and it may have been wiser and better that they should not have done so. It is immaterial whether they did or did not tell Smith and Stephen the whole basis and consideration for the alliance they had made with Mr. Farley, for assistance, suggestions, advice, information and railroad judgment, from time to time, as needed.

But until Mr. Hill's remarkable abilities had become developed (from the local freight handling at the St. Paul station, under President Becker, for the fragmentary roads of 1873–4–5, to a leading position in the enterprise that culminated in the entire control of the First Division and Extension Lines), no one would have credited him with the sobriety of judgment and the ability necessary to direct and determine such an affair.

Under the tutorage of men like Mr. Kittson, Mr. Farley, Stephen and Kennedy, Mr. Hill's abilities developed very rapidly. Two or three years of close contact with such men as these was all that Mr. Hill needed to develop his strength and sagacity. But the record is no clearer on that point than it is upon the point that at the beginning of the enterprise Mr. Kittson and Mr. Farley were the determining factors, and that Mr. Hill was in reality then beginning to build the foundations of his success upon the strength of judgment and character possessed and displayed by Mr. Kittson and Mr. Farley. True, the latter old men belonged to a former generation, as it were, being pioneers whose boyhoods were spent among the lead miners of Galena and Dubuque, or among the trappers and fur traders of the far North-West, whose vigorous young manhood witnessed the first openings of civilization in the wildernesses of the west, lacking that opportunity for early education which is so essential to cope with the more modern methods of business dealings. Yet those men were men of prominence, and generally recognized ability and character far superior to that of Mr. Hill at the earlier dates; and without their assistance and co-operation, the leading events portrayed in the record of this cause would never have taken place.

Resuming the thread of events.

THE FINAL PROPOSAL.

The proposal made January 5, 1878 (913–14), afterwards substantially embodied in the agreement between Kittson, Hill, Smith and Stephen, as purchasers, and the Dutch committee, holding a majority of all the bonds, as vendors (which was dated March 13, 1878), (35), was in substance as follows:

In view of the impossibility of obtaining a loan to purchase the bonds which acceded to the proposal of May 26, 1877, viz: of the

$ 1,200,000	issue.....	$ 625,000	at 75c.
2,800,000	"	708,000	" 28c.
3,000,000	"	907,000	" 30c.
6,000,000	"	3,400,000	" 35c.
15,000,000	"	11,200,000	" 13¾c.

We propose to purchase the same bonds at the same prices, payable: To the holders, interest during the foreclosure suits, at six per cent., semi-annually, on the purchase money; and

To pay the principal within six months after foreclosures, by issuing to the said bondholders six per cent. bonds of the new company, and in addition thereto six per cent. preferred stock to the bondholders, at the rate of $250 for each $1,000 bond of said new issue; and

To pay to the holders of the special stock the cost to them of building the Breckenridge–Barnes Link, so-called; and

To advance the necessary means to complete the Extension lines from end of track north of Crookston to St. Vincent, and Melrose to Alexandria, and to obtain connection with the Canadian Pacific from St. Vincent to Winnepeg.

The new issues (as above), after the foreclosures, to cover also the cost of the Link and Extensions.

The option being reserved to pay the bond purchase money in cash.

Pending the foreclosures and organization of the new company, the purchased bonds to be placed with the trustees, to be delivered on performance.

Purchasers to have control of foreclosure proceedings.

Custody of the bonds not to be changed without mutual

consent, but the bonds to be used by the purchasers in the management of foreclosures.

No other special or preferred stock to be issued than above provided for.

Articles of agreement to be drawn on this proposal being accepted.

While the proposition above outlined was pending with the Dutch committee, Mr. Farley was kept advised of the course of events; and he informed the agents of the committee of his interest in the proposed purchase, and received from those agents a full consent thereto.

The proposal to buy the bonds on credit as above set forth, was made on January 5, 1878. (See D. Ex. 14, p. 915.)

On the evening of the same day, as Mr. Hill testified, an agreement was signed as a memorandum, as to the several shares of the associates in the enterprise; which was afterwards, on January 21, 1878, signed as an agreement. (See Hill's testimony, 619-20.)

On January 7, 1878, Mr. John S. Kennedy wrote to Mr. Farley (315):

Messrs. Kittson and Hill, with their counsel, Mr. Galusha, left for St. Paul Saturday evening, and I understand Mr. Rice accompanied them. I had some talk with Mr. Rice when here, and he seems disposed to do what is right. Mr. Hill will explain to you the situation of matters here, and the prospects of closing the negotiation with the Dutch committee, which I *hope* and *believe* will go through. At all events, I will do everything I can to have it do so, both as the best thing for the Dutchmen, under all the circumstances, *and a good thing for Kittson and Hill and their friends;* and, if it does not go through, it will be no fault of mine.

On January 14, 1878, (316) a like letter as to details, and approving the good management shown.

On January 21, 1878, a written agreement (previously signed as a memorandum on the day the proposition was made, viz: January 5, 1878), was signed at New York between Kittson, Hill, Smith and Stephen for the division of the

interests in the enterprise, into one-fffths, each of the parties to have one fifth, except Mr. Stephen who held two-fifths, under clauses as follows (915-16):

It being, however, understood and agreed that one-half of the said two-fifths so held by said George Stephen, as above, is held by him for the purpose of securing the co-operation of an associate or associates in said enterprise, through whom the financial aid necessary to enable us to complete such purchase, may be obtained as understood between us in New York at the time of making our said offer of purchase.

It is expected that the said one-fifth interest so to be disposed of by said Stephen will be sufficient for the purpose of securing such associate or associates, and that upon the completion of such purchase and the reorganization of said company, the interest of each of the undersigned in said enterprise and in said new company shall be an equal one-fifth interest therein, subject only to said bonded debt and said preferred stock.

Having full confidence in each other and in the success of said enterprise, we hereby mutually agree to become responsible for the repayment of all moneys required to be advanced to us in carrying out said purchase (if said offer be accepted), and to join in the execution of any papers or securities which may be required in obtaining such advances.

On January 24, 1878, a cable message from the committee was received, acknowledging the receipt of the proposal, and asking some change in the terms proposed. (913.)

On January 26, 1878, Kennedy & Co. wrote Mr. Farley (992) that the negotiation was still in progress, and expressing their hope that it would be completed satisfactorily, though the details were intricate and difficult of arrangement. (992.)

On February 8, 1878, the letter was written, already referred to, to the effect that the negotiation was well nigh concluded. (316.)

On February 15, 1878, Mr. Farley wrote Kennedy & Co., asking for a short, condensed statement of the contract between the bondholders and Kittson and Hill, "how much of

each kind of bonds do our friends get, price of each, and how and when do they pay?" (1,008.)

On February 19, 1878, Kennedy & Co. wrote Mr. Farley (993), stating the main points of the proposal, evidently in response to Mr. Farley's request in his letter to Kennedy & Co. of February 15, 1878, which letter was not obtainable from Mr. Kennedy or the defendants.

On February 22, 1878, Mr. Farley wrote Kennedy & Co., (1,009), acknowledging their letter of the 18th, and asking for their understanding of the contract with the committee, and adding:

"You will understand the drift of my inquiries. *It has been more than intimated to me* that Messrs. H. & K. would be pleased to make me interested in their share of what may result from the trade, in order to have me help them work the matter through in Minnesota, care for the property, etc."

On February 25, 1878, John S. Kennedy wrote Mr. Farley the letter introduced in evidence upon the issues of fact on the plea heretofore considered and passed upon by this court, in which letter Mr. Kennedy said (317):

"DEAR SIR: We are in receipt of your favor of 22nd inst., and will send you the particulars you desire with pleasure, but two of our clerks are away sick, so that we are shorthanded, and we will have to ask you to excuse us till to-morrow or next day. We think it will pay you to take an interest with K. & H., and we are glad to hear that they have offered it to you.

The purchase has now been concluded; we have so advised the committee at Amsterdam by cable to-day and it will be publicly announced there to-morrow morning.

On February 27, 1878, John S. Barnes wrote Mr. Farley in further reply to Mr. Farley's letter of February 22, 1878. In this second reply (which Mr. Barnes wrote), he gave the figures Mr. Farley had requested in his letter of the 22d, and which Mr. Kennedy said in his letter would be sent with pleasure in a day or two, and closed as follows:

"We believe these figures will cover your inquiry. *We shall have great confidence in the future success of the enterprise if you continue your connection with it.*

"It must be a great relief to you to have Mr. Hill to attend to legislative matters. We regard him and his associates now as the real parties in interest." (994.)

Kennedy & Co. being advised, as already seen, of Mr. Farley's interest with Kittson and Hill, and having expressed their consent thereto, and their great confidence in the future success of the enterprise if Mr. Farley should continue his connection with it, wrote him further on March 9, 1878 (318) (after referring to some trouble—some matters):

Please get along best way you can for the present, and aid Kittson and Hill in any way you can, as they and their friends are now really the owners of the property, and as soon as some details are completed we will leave them to say what shall and shall not be done.

The Purchase Made.

On March 12, 1878, Mr. Kittson was still absent in the south, and Mr. Hill telegraphed from London, Ontario, to Mr. Stephen at New York: "Kittson not returned. Will arrive "with Galusha to-morrow." (1,303.)

On March 13, 1878, the agreement to buy the bonds of the Dutch committee was signed. (See copy attached to the answer, pp. 35–45.)

Substantially, but very briefly stated, the agreement was as follows:

Date March 13, 1878: Between Geo. Stephen, D. A. Smith, Norman W. Kittson and J. J. Hill, first party, and Chemet & Weetjen (and the other firms and persons forming this committee, each named):

Article I. Second parties sell to first parties of bonds of:
$1,200,000 issue, $625,000 at 75c.
$2,800,000 " $760,000 " 28c.
$3,000,000 " $907,000 " 30c.
$6,000,000 " $3,520,000 at 35c.
$15,000,000 " $11,400,000 " 13¾c.
Unpaid coupons included.

ART. II. The bonds to be placed in the hands of Kennedy and Barnes, as trustees, and delivered to the purchasers on payment as aforesaid. If paid in bonds and stocks (as hereinafter), the purchased bonds to be held to complete this agreement and the foreclosures.

ART. III. Payment to be made on or before six months from the last sale under foreclosure decrees of the lines mortgaged.

ART. IV. Interest at 7 per cent. semi-annually, in gold, to be paid on the total purchase price, from December 22, 1877, till the full contract price is paid.

ART. V. The principal to be payable either in gold or in 7 per cent. first-mortgage bonds of the new company to be organized.

ART. VI. The purchase price to be paid in such new bonds at par, together with $250 of new 6 per cent. preferred stock for each one-thousand dollar bond, as a bonus—(interest being conditioned on sufficient earnings to pay that amount).

No liens to be placed on the reorganized road except the new mortgage, at not to exceed $12,000 per mile of road. The total preferred stock limited to twenty-five per cent. of the new bond issue.

ART. VII. Option being (1st.) The purchasers may pay in cash, or in bonds and stock of the new company as aforesaid; provided (2d) that any holder of the committee's certicates may demand either cash or new stock and bonds, at his election.

ART. VIII. Within sixty days after notice from the purchasers of their election as to the form of payment, the committee's certificate holders shall have the right to receive for the price of the old bonds, new bonds at ninety per cent. of par value, for their certificates—but in that event shall not receive the bonus of preferred stock.

ART. IX. The purchasers agree to complete the extension line from Snake river to St. Vincent, during 1878, if practicable; and to give a $100,000 bond to do so within two years.

ART. X. The purchasers to pay in gold the cost of the Red River and Manitoba Railroad (Breckenridge-Barnes Link), with interest to December 22, 1877, and on that sum (to be hereafter ascertained) interest at seven per cent. semi-annually, till final payment, when the bonds are paid for.

ART. XI. The bonds and stock of the last named company, with proxies, to be deposited with the trustees, with the right

to the purchasers to operate and expend all incomes therefrom, pending the completion of this agreement.

ART. XII. On this agreement being signed by the committee and delivered to Stephen, $280,000 in the Bank of Montreal, New York, shall be paid to Kennedy & Co. (they accepting the trust, and declaring their possession of the bonds, and Link line stock), which payment shall be in full of all expenses, etc., of the committee.

ART. XIII. If the purchased bonds are paid for in new bonds and stock (by election of the purchasers or bondholders), the new issue of bonds shall not exceed $12,000 per mile of finished road.

ART. XIV. The six pending foreclosure suits (named), shall be conducted by concert of both purchasers and vendors, free from expense to the vendors after December 22, 1877. Nothing shall be done to delay the suits.

ART. XV. If the trustees in possession of the First Division roads shall make any division of the earnings, the share belonging to the purchased bonds shall be paid to the purchasers.

ART. XVI. For the purpose of use in exchange for lands only, the purchasers may withdraw bonds from the hands of the trustees on paying cash (at purchase prices) therefor, down to sixty per cent. of the total of each bond issue, without, however, affecting the options of the certificate holders.

ART. XVII. All cash paid in on bond-withdrawals shall be held in trust, and paid over to the trustees of the new company as a sinking fund to apply to the payment of the new bonds at lowest market price, or by lot, with five per cent. premium.

ART. XVIII. The form, terms and trustees, of the new mortgage and bonds, shall be satisfactory to Kennedy & Co., and cover all the property and land grants; and the new bonds shall be receivable for lands.

ART. XIX. If the bonds shipped from Europe shall be lost in transit, by fire or shipwreck, notarial certificates in the usual form, shall be accepted, and payment made as though no loss had occurred; the committee, however, to indemnify against the subsequent production of lost bonds.

ART. XX. The trustees shall use the bonds at foreclosure sales and buy in the roads; and thereafter convey them to the new company. For such purposes the bonds may be removed from the place of deposit.

ART. XXI. Otherwise the bonds shall remain in the Mercantile Safe Deposit Company at New York in iron safes, pending this agreement.

ART. XXII. Either party may examine and verify the bonds.

ART. XXIII. On default of payment of interest (as aforesaid), for thirty days, or of the principal for six months after the last foreclosure sale, all payments hereunder shall be forfeited, the bonds and stock returned, and the rights of the purchasers absolutely ended.

ART. XXIV. The purchasers shall bear all expenses after December 22, 1877.

ART. XXV. The surviving or remaining trustee shall fill any vacancy of a trusteeship.

ART. XXVI. Until a dividend of six per cent. shall be paid on the new preferred stock by the new company, the vendors shall select two directors.

ART. XXVII. The new company shall be organized within six months after the last foreclosure sale, so that the payments by new bonds and stock may be delivered within that period.

Signed by George Stephen and associates, and the Dutch Committee.

Authenticated, as to signatures of the Committee, by the United States consul at Amsterdam, April 8, 1878.

Sworn proof of signatures of the purchasers and their delivery of the instrument (Kittson by attorney), made at New York, November 4, 1878, before a notary.

Acceptance of the trust and declaration of possession of the bonds, scheduled, and Link line stock, made by John S. Kennedy and John S. Barnes, and attached to the agreement. (45.)

THE SHARES AGREED UPON.

Mr. Kittson did not return from his southern trip until after the date of the agreement of March 13, 1878, which was executed through his attorney in fact.

On March 18, 1878, Mr. Hill being in New York, telegraphed Mr. Stephen at Montreal, that Mr. Kittson arrived home on Friday, and had been asked to be at Montreal Thursday, (1303).

On March 27, 1878, Stephen, Smith, Kittson and Hill, made another agreement as to their interests in the enterprise, modifying somewhat, though substantially following the former agreement of January 5 and 21, 1878, the new agreement being briefly:

A recital of the purchase made March 13, 1878, and the intention to issue, (besides the new bonds, preferred stock), common stock to the amount of $5,000,000, or any amount hereafter agreed upon.

Now it is agreed that the interests in the property acquired and in the new company and profits and losses, shall be apportioned to Stephen two-fifths, Smith one-fifth and Kittson one-fifth, and Hill one-fifth; one-half of the share to Stephen to be held by him to secure the necessary means to carry out the agreement, through bringing in and securing the co-operation of an associate or associates if necessary; 'it being expected that said one-fifth so ~~as~~ to be disposed of by Stephen *will be sufficient for the purpose of securing said moneys and the bringing in of such other associate or associates, if necessary, to fully carry out the purchase;* and that on the new company being organized the share of each shall be equal, 'subject only to the prior liens' of the bonded debt, and preferred stock required to fully comply with the purchasing agreement, 'and to pay in full all moneys borrowed or advanced for payment of interest or debts incurred in completing said railroads, and in fully carrying out our said enterprise.'"

Each becomes responsible for repayment of money advanced, and for the performance of the purchasing agreement, and agrees to sign notes, bonds and securities "necessary to execute from time to time, to procure any loans or advances."

In case of the death of any of the five parties, pending reorganization, the representatives of the deceased may demand the refunding of all advances, with twelve per cent. interest; and the survivors shall have the option to pay the same, with a further sum of $75,000, in full for all the interest or claim of any and every kind, under this or the Dutch agreement, by the estate of the deceased; such estate being also relieved of all obligations, and receiving back all notes or securities.

If any of the five parties desire to sell their interests, the others may buy at the price offered. No sale to outside parties to be made without consent, etc.

The Red River Valley road (costing about $20,000) shall go in at cost, as part of the purchased property.

The stock of the Red River Transportation Company (Kittson's boat line), held by any parties hereto, is to go in as purchased property at sixty per cent. of its par value, and all such stock afterwards bought shall go in at its cost, and stand on the same footing as all advances in this enterprise.

Signed by the five parties, and endorsed "Syndicate, St. P. & P. Ry. Mutual Agreement 27 Mch. 1878." (1268-71.)

The First Steps under the Purchase.

On April 4, 1878, a petition was filed by Mr. Farley as receiver for an order of court allowing him to build the extension lines and issue debentures therefor.

The petition set forth:

1. The order of August 1, 1873, for the appointment of the receiver, for the purpose of completing the lines.
2. That only $100,000 of debentures had been issued on account of construction.
3. That a plan to furnish money (about a million dollars), and build in 1873 had been frustrated by the panic of 1873, and the hostile legislation of 1874 to 1878.
4. Stated the situation of the Minnesota legislation as to the land grants—all hostile to the bondholders.
5. The forfeiture and confiscation of the Brainerd branch.
6. The act of March 9, 1878, granting extensions of the time for completing the extension lines, till later dates, viz:

From Melrose to Sauk Centre,—August 1, 1878.
Sauk Centre to Alexandria,—December 1, 1878.
Crookston to St. Vincent,—January 1, 1880.
Alexandria to Fergus Falls,—January 1, 1880.
Fergus Falls to Glyndon,—January 1, 1881.

And forfeiting the land grants and franchises for non-completion as so provided.

7. States bills are pending in Congress for forfeiture of said land grants.
8. States distances and sidings of each part of the extensions yet to be completed—total 194½ miles, at probable average cost of $12,000 per mile.
9. That the receiver has unquestionable assurances from

the representatives of a large majority of the bonds of the $15,000,000 issue, that they will provide the necessary funds to complete to St. Vincent upon debentures of the character heretofore authorized.

10. Sets forth unfavorable conditions and surroundings of the completed portions of the extensions.

11. States prospects of Canadian connections, and danger from other companies first connecting.

12. States lands held now, and applications of settlers needing the railroads, the vigorous opposition of the Northern Pacific Co., and keeping of the lands out of the market, which could, with advantage to creditors, be sold to pay the debentures issued and to be issued.

13. Prays for a rule on defendants to show why direction to complete the lines, sell the earned lands, and issue debentures, should not be made by the court, and for further directions. (1552–7.)

On the same day, April 4, 1878, Mr. Kennedy wrote Mr. Farley a long letter, stating, among other things (998):

Confidential. 4th April, 1878.

J. P. Farley, Esq., St. Paul, Minnesota.

Dear Sir: I presume you have seen Messrs. Kittson & Hill since their return to St. Paul, and learned from them how matters now stand between them and the Dutch committee. They are now the virtual owners of the property, and with their friends in Canada must go on and complete it as early as possible; and as this is quite as much for the interest of the Dutch bondholders, whom we continue to represent, as for Kittson & Hill and their associates, we hope you will do everything in your power to aid them.

Mr. Stephen was here this week and told me that both Kittson and Hill had spoken of you *in the very highest terms and showed the most kindly feeling toward you*, and that he and they wanted you to remain and aid them in completing the lines this year, and intimated very plainly that they both could and would make it worth your while to do so. They have no idea of superseding you but mean you to remain in full charge and with full power and authority, only desiring that you should work in harmony with them, which I assured him you would do so long as you were not asked or expected to do something you ought not to do, and that he assured me you never would be.

They wish to press on and complete the entire lines to St. Vincent and Fergus Falls at the earliest possible moment, and their intention is to raise the funds for doing so through the medium of Receivers' Certificates at eight per cent. You will require to get a modified order from Judge Dillon to do this which he will no doubt grant you, and I think that is the best and indeed the only way to do it in present circumstances. I have told Mr. Stephen they have a good thing if they will arrange carefully and economically, but if they do not husband their resources, they may fritter all their profits away. I also advised him not to allow statements to be made in the newspapers, such as have appeared lately, but to keep their own counsel and say nothing about their bargain and what they expect to make out of it. Mr. Stephen has acted on these suggestions, and has written them fully on the subject, and if they give you the opportunity I wish you would give them the same advice. * * *

On April 18, 1878, an order was made in the Receivership case, on the receiver's petition:

Reciting an order of April 8th, to show cause, etc., and that the Northern Pacific and First Division companies objected—directing that Gen. Henderson and Gov. Reynolds of Missouri be appointed commissioners for fully advising the court on:

1. The cost of completing and equipping.
2. The ownership of the bonds, etc.
3. How many owners will take debentures; and to obtain their formal agreement for advances, and the assent of the new trustees to the issue of debentures.
4. What guaranties should be required of funds to complete at least to Fergus Falls by January 1, 1879.
5, 6, 7. What securities should be required, and what priorities given, and terms and lien of debentures.
8. What provisions to secure the bondholders not joining.
9. The value of the lands earned and not earned, and proper provisions as to their sales.
10. What provisions should be made as to issuing and registering debentures, whether by sections completed, etc., and as to securing expenditure.
11. The commissioners to hear the parties touching the order applied for.
12. The commissioners to report for or against the order, with draft of an order recommended. Power to further order reserved.

On May 7, 1878, the reports of Commissioners Reynolds and Henderson were filed. (410-434.)

The reports include:

1. Statement of the minutes of proceedings by Thomas C. Reynolds, commissioner, as to conferences and investigations of matters in the East, with copies of documents appended.
2. Statement of investigations and proceedings by J. B. Henderson, commissioner, of matters in Minnesota.
3. Joint report by Commissioners Reynolds and Henderson, submitting draft of decree.

Pending the order on the reports, there was traveling backward and forward; Mr. Stephen was at St. Paul and Mr. Farley and Mr. Hill were East. (1708.) While at New York, Mr. Farley sent a telegram to Judge Dillon, May 25, 1878, asking whether the court would allow a contract to be made with responsible parties for construction. (995.)

The Former Plea Herein.

When this case was before the court at the October term, 1886 (120 U. S., 303), the deposition by Mr. Farley, upon the disputed matters in issue upon the plea, was before the court, without any evidence by Mr. Kennedy, or any other witness, to contradict his testimony. Mr. Farley testified in that deposition (page 72 of the record on the former appeal, 120 U. S., 303):

"I had a conversation with Mr. Kennedy in his private office, 41 Cedar street, New York, about my being interested with Kittson and Hill in the purchase of the bonds referred to. Mr. Kennedy made no objections, but rather seemed to be gratified. He thought it was a good thing for me, and only advised me to ascertain how much money it would be necessary for me to raise to carry out the project. To the best of my recollection this was in the month of April, or very early in May, 1878."

When this case was before this court at the October term,

1886 (120 U. S., 303), as above stated, upon the issues raised by the plea of the defendants, this court held:

"The substance of the averments in the second part of the plea was that neither Kennedy nor the bondholders, whose agent and representative he was, had any notice or knowledge that the plaintiff had, or claimed to have, any interest in the project set forth in the bill until after the sales of the railroads under decrees of foreclosure. The matter of fact thus averred was put in issue by the replication. The testimony of the plaintiff (in connection with Kennedy's letter to him), which was uncontradicted, and was the only evidence upon the matter pleaded, shows that Kennedy, before the completion of the sale and purchase of the bonds, knew that the plaintiff was to have an interest in the project, although he may not have known the extent of that interest or that it had been already acquired. The want of notice to Kennedy and the bondholders, averred in the plea, is thus disproved."

Farley v. *Kittson et al.*, 120 U. S., 303.

The fact thus settled by the evidence upon the truth of the plea, having been so determined in favor of the complainant, and being no longer open between the parties to this cause, no additional proofs were offered by the complainant thereon.

JOHN S. KENNEDY.

An attempt was made, however, by the defendants, to open the questions thus settled by the plea, by calling John S. Kennedy as a witness, and examining him, among other things, as to when and how he was informed by Mr. Farley that Kittson and Hill had expressed a willingness that Mr. Farley should have an interest in their share of the profits that might be realized from a purchase of the bonds held by the Dutch committee. (1,593, Q. 8.) Further questions bearing upon the same subject-matter, calling for Mr. Kennedy's version of

the correspondence and conversations between himself and Mr. Farley on the subject of Mr. Farley's interest with Kittson and Hill, were asked, and objected to as relating to matters which had been settled conclusively by this court under the plea. (1,593–1,603.)

Notwithstanding the objections made to opening the matters again, which the plea had settled, the questions were answered by Mr. Kennedy. (1,593–1,603.)

The replies made by Mr. Kennedy were contradictory to the statements by Mr. Farley in his deposition on the plea, as to when and how and to what extent Mr. Kennedy knew, before the foreclosure sales, of the interest of Mr. Farley in the purchase of the bonds. Such evidence by Mr. Kennedy was given for the purpose of showing that the determination of facts upon the plea, reached by this court, was erroneous.

However, Mr. Kennedy was cross-examined as to such statements by him, and the version and statements made by him were completely overturned, by confronting him with his former sworn evidence in the Sahlgaard case, a bondholder's suit in 1880, in which testimony Mr. Kennedy had given a widely different statement of the same subject; (1,630–1,633; his Sahlgaard deposition, 1,748, Q. 27.)

Mr. Kennedy had posed as the old friend of Mr. Farley, ready to give him good advice, and keep him from becoming improperly a director of the company purchasing at the foreclosure sales (the defendant railroad company), etc., etc.

But on cross-examination, Mr. Kennedy admitted that when he left for Europe on his then present visit, he held capital stock of the defendant company (the St. Paul, Minneapolis and Manitoba Railway Company), to the amount of about two millions of dollars. That evidence was drawn from Mr. Kennedy with extreme difficulty. (1,607–8.)

In other respects Mr. Kennedy's memory of what took place

in 1878 and 1879, by correspondence and conversations between him and Mr. Farley was shown to be greatly biased and defective.

The deposition of John S. Kennedy as a witness for defendants, was taken September 3d to 12th, inclusive, at Berne, Switzerland. The issuance of a commission to take this deposition was objected to by complainant on the ground that the matters enquired of in the interrogatories propounded, had been passed upon and conclusively settled in favor of complainant by the Supreme court, and are *res adjudicata* as between the parties to this suit. (1,593–8). We still insist on this objection, which was specially interposed to the questions propounded.

In addition to this objection, which is below more particularly considered, we submit:

(1.) Mr. Kennedy is by no means a disinterested witness. He admitted on cross-examination, that in February last he held and owned stock of the defendant, the St. Paul, Minneapolis and Manitoba Railway Company, to the amount of $2,000,000, though some of it may have been sold since by his brokers, of which he was not advised. (Rec., 1,608.) That he was the vice-president of that company, until he resigned the previous January, and that he was a director in the company, but believed he ceased to be such director in August (1888), though he had no knowledge on the subject. (Rec., 1,607.)

(2.) Upon being confronted with his deposition in the Sahlgaard case (Rec., 1,740), in which he testified, in December, 1881, that he really never had but one conversation with Mr. Farley on the subject of his interest in the so-called syndicate or combination, which conversation was in June, 1879, and the witness' attention being called (Rec., 1,630) to the discrepancy between that statement and his present testimony,

wherein he narrated a long conversation on that subject between himself and Mr. Farley in April, 1878, he drew a fine distinction between "what was claimed as having been acquired, and what might at any time have been offered;" and this was substantially all the explanation he could make of these contradictory statements.

(3.) Mr. Kennedy exhibited in his testimony, not only great power of argument, but also a most remarkable memory in some particulars, and an equally remarkable lack of memory in other respects.

He could remember particularly and relate with great minuteness, and "at least substantial accuracy," as he stated, long conversations which occurred some ten years ago, nothing being shown to have since refreshed his memory, while he *had not the least recollection* of important letters on the same subject written to him and replies thereto written in his own handwriting.

Among the letters which had thus entirely passed out of his recollection, was the letter written to him by complainant, dated February 22, 1878, in which he said:

"I have your confidential favor 18th, for which I am under many obligations. I would be pleased to have your understanding of the contract as to the number of bonds of each issue Messrs. Hill and Kittson and their associates are under obligation to take under the arrangement. You will understand the drift of my inquiries. It has been more than intimated to me that Mess. H. & K. would be pleased to make me interested in their shares of what may result from this trade, in order to have me help them work the matter through in Minnesota, care for the property, &c. My judgment is some of these bonds is cheap at the price named, and others very much higher than I would pay. Yours, &c. J. P. Farley." (Rec. 1,009.) Also the letter in reply thereto, marked "confidential,"

dated February 25, 1878, in Mr. Kennedy's own handwriting, in which he said:

"DEAR SIR: We are in receipt of your favor of 22nd inst., and will send you the particulars you desire with pleasure, but two of our clerks are away sick, so that we are short-handed, and we will have to ask you to excuse us till to-morrow or next day. We think it will pay you to take an interest with K. & H., and we are glad to hear that they have offered it to you.

"The purchase has now been concluded; we have so advised the committee at Amsterdam by cable to-day, and it will be publicly announced there to-morrow morning.

"The writer telegraphed you to-day, as trustee, to remit $4,800 to pay the interest due 1st March on the $120,000 issue of Branch Line bonds.

Yours, very truly,
JOHN S. KENNEDY."

Mr. Kennedy also forgot the letter to complainant, marked "private," written by J. S. Kennedy & Co., February 27, 1878, giving the particulars mentioned in his own letter of February 25, 1878, being the number and amount of the bonds of the various issues, and further saying:

"We believe these figures will cover your inquiry. We shall have great confidence in the future success of the enterprise if you continue your connection with it.

"It must be a great relief to you, to have Mr. Hill to attend to legislative matters. We regard him & his associates now as the real parties in interest. (317, 994.)

(4.) Mr. Kennedy nowhere testified that he expressed to Mr. Farley any disapproval of his being interested in or connected with the enterprise. He could hardly have done so in view of his expressions in the letters above referred to, viz:

"We think it will pay you to take an interest with K. & H.

and we are glad to hear that they have offered it to you"; and "we shall have great confidence in the future success of the enterprise if you continue your connection with it."

In view of these expressions, Kennedy fell back upon the statement that at the time these letters were written, he understood that complainant was to have only a "*small*" interest, and that it had only been "*offered*," to, and had not at that time been actually accepted by complainant. The Supreme court in passing upon this point, held it was immaterial whether Kennedy then knew "the extent of that interest, or that it had been already acquired."

(5.) Kennedy's account of this conversation of April, 1878, is expressly denied by complainant who testified that on that occasion, he told Mr. Kennedy all about his being interested with Kittson and Hill. (Rec., 1,669.) Complainant having learned, by the letters received previously, that Kennedy had no objection to his having an interest, there certainly was no reason for concealment. The testimony of complainant, taken in connection with the letters of Kennedy & Co. written at the time, are sufficient and convincing proof that Kennedy was informed of complainant's interest.

(6.) Kennedy's bias against complainant for some reason or other, and his desire to aid the defense by every means in his power, are plainly visible all through his deposition. Thus, in testifying concerning his interview with complainant in March, 1879, in regard to the appointment of Mr. Wakeman as superintendent of the railways, he said:

"At this same interview I asked Mr. Farley whether Mr. Fisher could not fill the position, but he said no, that when he left Mr. Fisher would probably return to Dubuque with him. He said he supposed I knew why Mr. Fisher was with him, and on my remarking that I did not, he said he was a nephew of Mr. Stout of Dubuque, who was his surety on his receiver's

bond, for 100,000 dollars, at least I think that was the amount stated." (Rec., 1,598.)

Upon our returning to this country and resuming the taking of testimony in this cause, at St. Paul, we found among the files of this court the bond of Mr. Farley as receiver, in the sum of $100,000, filed in the Kennedy case September 18, 1873, and introduced the same in evidence. It is signed by Jesse P. Farley, as principal, and Richard A. Babbage and Maurice Brown (both of Dubuque), as sureties, and the name of Mr. Stout is not upon it, nor mentioned in it. (Complt's. Ex. 222, Rec., 1,712.) Mr. Farley also testified he had never made the statement attributed to him by Mr. Kennedy in regard to Mr. Fisher, Mr. Stout or this receiver's bond. (Rec., 1,671.)

(7.) Kennedy's testimony as to matters passed upon by the Supreme court in its decision on the plea, was entirely incompetent and inadmissible.

Under the pleadings and stipulations before this court on the hearing on the plea, the only issue of fact to be determined by the court was whether complainant ever informed John S. Kennedy or any of the bondholders, of his interest in the project of purchasing said bonds and thereby acquiring said mortgaged property; and whether Kennedy or any of the bondholders ever knew, suspected, were informed or believed, at any time until after the confirmation of the foreclosure sales, that complainant claimed such interest. The lack of such information, knowledge, suspicion or belief was affirmatively set up by said plea and the burden of proof was on said defendants to prove the same.

The only evidence introduced in this court by either party upon the said issue of fact, was the testimony of complainant, taken by stipulation March 15, 1882, and certain orders, bills of complaint and proceedings in the cause of *John S. Kennedy*

et al. v. *The Northern Pacific R. R. Co. et al.*, all of which are set forth in the record afterwards filed in this cause in this court upon said first appeal.

On the 15th day of July, 1882, the Circuit court entered its decree, hereinbefore recited, sustaining the pleas of the defendants, and dismissing the bill of complaint.

Thereupon the complainant prayed, was allowed and afterward perfected his appeal from said decree, to the Supreme court, and such proceedings were therein afterward had that said appeal came on to be heard at the October term, A. D. 1886, of the Supreme court, and after argument of counsel and due consideration by the court, the said decree of this court of July 15, 1882, was entirely reversed and annulled. And the Supreme court, upon the only issue of fact arising on said plea, expressly decided as follows:

"The averments in the first part of the plea, restating in detail some of the facts alleged in the bill, were admitted by stipulation of counsel, in writing, to be true, and no controversy arose upon them.

"The substance of the averments in the second part of the plea was that neither Kennedy nor the bondholders, whose agent and representative he was, had any notice or knowledge that the plaintiff had, or claimed to have, any interest in the project set forth in the bill until after the sales of the railroads under decrees of foreclosure. The matter of fact thus averred was put in issue by the replication. The testimony of the plaintiff (in connection with Kennedy's letter to him), which was uncontradicted, and was the only evidence upon the matter pleaded, shows that Kennedy, before the completion of the sale and purchase of the bonds, knew that the plaintiff was to have an interest in the project, although he may not have known the extent of that interest or that it had been already acquired. The want of notice to Kennedy and the bondhold-

ers, averred in the plea, is thus disproved. (*Farley* v. *Kittson et al.*, 120 U. S., 303.)

We therefore claim and insist that thereby the only issue of fact joined on said plea was determined in favor of complainant, that by reason thereof the Supreme court reversed the said decree ~~of this court~~, and remanded said cause with directions to overrule the said plea and to order the defendants to answer the said bill; that all controversy as to the truth of the disputed matters set up in the plea has been set at rest and finally and conclusively determined against the defendants; and that the decision of the Supreme court of the United States thereon is *res adjudicata*.

Building the Extension Lines.

After the visit to New York in May 1878, at which Mr. Farley informed Mr. Kennedy fully as to his interest in the enterprise, the next step in the affairs was the order entered by the court for the building of the extension lines.

On May 31, 1878, the order was made by the court, for the completion of the extension lines. Briefly stated:

Setting forth the equitable ownership of $11,400,000 of the $15,000,000 issue of bonds, under the agreement of March 13, 1878, by Stephen, Smith, Kittson and Hill (held by Kennedy & Co., trustees); their proposal to furnish, or cause to be furnished, the full sum necessary to complete and equip the extension lines, under the act of 1878, to save the land grant, on equitable terms to all parties; that foreclosures cannot be had in time to save the grants, whereby the security for the bonds will be lost.

The orders hereinafter made are based upon the fundamental consideration and condition that enough money shall be advanced to the receiver to build and equip the lines (no debentures being allowed to be issued in advance, etc.)

Now the receiver is authorized with such moneys to proceed to construct and equip the extension lines at the lowest cost in cash, accounts to be kept and monthly reports thereof

to be made, not to exceed $10,000 per mile, including sidings, buildings, and equipment.

When completion is made to secure the grants, debentures will be issued in gold for sums actually advanced, with eight per cent. interest, and become a lien only on the newly built lines; power to extend the lines being reserved.

Any bondholder of the $15,000.000 issue is accorded the right at any time before the issue of debentures or before the foreclosure sales, to pay his pro rata share of the necessary cost of construction and equipment and to place himself in this regard on the same footing as Smith, Stephen, Kittson and Hill, and be entitled to equal rights with them in respect to debentures and the liens thereof.

No debts to be contracted or liens otherwise created.

Stephen, Kittson *et al.*, shall execute an instrument approving this order and agreeing to furnish all the money herein required, which shall stand as a security to any contractor or laborer injured by failure to comply herewith; and shall within sixty days procure and file the formal authenticated assent of the Dutch Committee to this order.

The receiver shall cause inspections and secure the land grants.

This order shall not take effect until assent to its provisions is made by the new trustees, Kennedy and Barnes, and the approval in writing of the terms hereof by the two commissioners, Henderson and Reynolds.

Kennedy and Barnes enjoined not to part with the possession of the $11,400,000 of bonds, without leave of court; and the Mercantile Life Deposit Company of New York to be served with a copy hereof.

The applications for leave to sell lands is continued; and power to modify this order is reserved.

A complete record ordered of all the papers and proceedings (1559-62).

The roads were built and equipped under this order, and the lands were thereby secured. See the final papers: Report of Inspectors to the Governor, November 11, 1878 (434); Certificate of Completion, November 13, 1878 (436); report of receiver thereon, November 14, 1878 (1564); order for debentures, December 20, 1878 (949).

Mr. Farley.—1878.

Mr. Farley testified on matters of 1878, as follows (104):

The contract which was signed between Kittson and associates, on the one hand, and the members of the Dutch committee on the other hand, on the 13th of March, 1878, contained some conditions—that Mr. Stephen and his associates purchasing the bonds should go on and build a certain amount of road, to secure the land grant, etc., and within the time limited.

It became necessary (this building had to be done on the St. Paul and Pacific road under the receiver), to at once apply to Judge Dillon for the necessary order authorizing the receiver to go on and build the said lines of road.

Very soon after the making of this contract, the facts being as I have stated above—I went with the attorneys—I think my own attorney was along, Mr. Heard, Mr. Otis, I think, to Jefferson City—to see Judge Dillon on the subject of getting this necessary order to complete the road, for the receiver. Mr. Hill was with me, I recollect that.

In connection with the attorneys, as my recollection serves me, we had several interviews with Judge Dillon.

We found the judge somewhat disinclined to have anything to do with the building of railroads, and I do not know that he made any particular order at all; have no recollection that he did—what it was; but in conversation with the judge he gave us all to understand that he would issue no such order until he satisfied himself, through the appointment of two commissioners, Mr. Henderson and ex-governor somebody—two commissioners—one was to proceed to Minnesota and thoroughly examine and report to him the great necessity of this hurry of building the road, that we wished to get the order for. The commissioner that came here was by the name of Henderson, and the one that he appointed, the other was to visit New York and ascertain by personal inspection, that J. S. Kennedy & Co. held and controlled the amount of the extension line bonds of the St. Paul and Pacific, as they had represented—about $11,000,000 of the fifteen. (104.)

Mr. Henderson came here, and I took a great deal of pains to carry him over the road as far as I could; and to satisfy him, in connection with Mr. Hill and the attorneys that might be interested in the matter, of the great necessity of building

this road to save the land grant; and also informed him as to the situation of the foreclosure suits then pending in the courts; and gave Mr. Henderson all and every facility and information that he desired to satisfy himself in order to make this report to Judge Dillon.

After the visit of Gen. Henderson to St. Paul on that business, a sufficient lapse of time intervened for them to make their report to Judge Dillon; and, as soon as we learned that Judge Dillon was in possession of these reports, Mr. Hill, myself, Judge Young here—there might have been others that I do not recollect, but us three I know—sought an interview with Judge Dillon at DesMoines, in Iowa, in order to get this necessary order that we have been talking about.

Judge Young and the other attorneys, if they were there, in my presence, had an interview with Judge Dillon; and the judge refused to grant any such form of order as seemed to us reasonable and fair, but did indicate the form of order that he would grant.

After talking the matter over, we thought the order that he proposed to grant was so unreasonable and so ironclad in its nature, we considered that Mr. Stephen, the man who had agreed to raise the money, would have great difficulty under that order of securing the necessary funds to complete the lines; and, in order to satisfy ourselves on that subject, Mr. Hill and myself (my wife was with me at DesMoines), we three proceeded to New York from DesMoines. The object of our visit to New York was to ascertain whether the money could be raised under this ironclad order that Judge Dillon was willing to grant.

Mr. Hill and myself didn't have an opportunity of talking with Mr. Stephen, but after some correspondence, as I understood it, between Mr. Stephen and Mr. Kennedy, Mr. Stephen being in Montreal, Mr. Kennedy and Mr. Barnes assured us the money could be raised, and would be forthcoming as the order required.

On the way to New York and return I couldn't particularly state what was said, further than our conversation dwelt a good deal upon this ironclad order of Judge Dillon, and talked about the property, its then present and future prospects. As to the precise words, I couldn't repeat them; but there was a great deal said on the subject of the prospective value of the property, and our great rejoicing over the purchase of the bonds, etc.

We came home from New York, as far as Chicago. Mr. Hill proceeded from there, I understood it, to St. Paul here. I went by way of Dubuque with my wife, and left her at home; and, to the best of my recollection—and very soon thereafter—met Judge Young in Davenport, where Judge Dillon then was, and secured the order which he was willing to grant—which is on file, and which, I suppose, will show for itself.

After Judge Dillon had entered the order at Davenport, I proceeded at once to take the necessary steps, and did commence the work of constructing a line from Melrose to Alexandria, and from Crookston to Pembina or St. Vincent—from Crookston to the International line.

My best recollection serves me that we received the certificate of the completion from the governor—after his sending commissioners over the line to examine it—my impression is that that was done in November; but we continued to work on the line until late in December, and finished up the roads more perfectly, so they would be more safe for traffic. (107–7.)

Cross-examination as to matters of 1878:

I never to my knowledge wrote in my letters to Kennedy & Co., or either of its members, things meant to deceive them. I never wrote any such letters to them or anybody else to my knowledge. (164.) I never made any statements to the court concerning my interest in these bond purchases.

The order made in the spring of 1878 by Judge Dillon, at Davenport, authorizing me to go on and complete certain portions of the extension lines, of which I was receiver, I think was made the last of May, 1878—the latter part of May. (See order of May 31, 1878, D. Ex. 160, p. 1559.) To the best of my recollection that order was made at Davenport—the final order. (165.)

I recollect little or nothing about the details of getting that order. I know that was the fact; that at our first meeting with Judge Dillon at Jefferson City, and afterwards at Des Moines, he was very reluctant to give any order whatever, but on this particular occasion I cannot recollect what was said or done. (166.)

As to whether, at the time of signing that order, Judge Dillon said, in the presence of Young and Hill:

"Now, Mr. Farley, I want you to remember that you are

my man in this matter; you represent the court;" and whether he charged me to see to it that Smith, Stephen, Kittson and Hill fully lived up to and performed the conditions required of them by that order; I think it very possible that that language was used by Judge Dillon, but I have lost from my memory everything connected with that Davenport meeting. It would be very natural for the judge to say so. I think he did possibly—don't recollect it. (168.)

(As a witness for defendants):

According to my best recollection I had no talk with Mr. Kennedy personally (as to my interests with Kittson and Hill), until May, 1878. My letter to Mr. Barnes of the 23d of August, (1876), I think it is, would intimate that I had been talking to him about it; but I don't recollect it. (1,379.)

In discussing the defendants' case, under the head of "Dealings of Mr. Hill and associate with Mr. Farley after January, 1878," it will be necessary to discuss the evidence bearing more particularly upon that phase of the case.

Mr. Farley testified, on rebuttal (1,662):

"As to the statement in the letter from Mr. Stephen to Mr. Hill, dated February 10, 1878, (D. Ex., 20; p. 919): 'On the face of it the idea of the Barnes Company leasing the Extension lines looks well. You will, however, I have no doubt, carefully consider every single step before taking it. We must in this matter be careful to preserve our character for sobriety and soundness of judgment;' and in the letter from Mr. Kennedy to Mr. Farley, dated June 10, 1878, (D. Ex., 57; p. 999): 'Mr. Stephen and his associates are anxious if it can be properly done to have the Extension lines, especially those to Pembina, leased to the Red River and Manitoba Railroad Company, so that they could operate the line in harmony with their boats on the Red river."

And as to any previous suggestion as testified to by Mr. Hill, that such lines should be leased, etc., Mr. Farley replied:

"There was no lease of those lines suggested to me only in this way, that there was talk about it in 1878—which I didn't see was practicable, and it never was done. That is the first I ever heard of any leasing to Mr. Hill or Mr. Kittson, to the best of my knowledge.

Not to my knowledge did either of those gentlemen make or open any negotiation through me with Kennedy & Co. for a lease to them—that is to Messrs. Kittson and Hill—or to the Red River Valley Railroad Company, of the said Extension lines or any part thereof, previous to the year 1878.

I heard the testimony given by Mr. Hill in this case, in which he stated and described the character of the negotiations which led to some general settlement of all disputed matters between the Northern Pacific Railroad Company, or its officers on the one hand, and Messrs. Hill and associates, the trustees of the First division and Extension lines, and perhaps others, which resulted in what is called a "protocol," being afterwards signed, evidencing such general agreement.

The Northern Pacific had completed a line from Brainerd to Sauk Rapids, where it connected with the branch line from St. Paul to that point. I think the first man that ever spoke to me about an interchange of business, etc., was Mr. Wright of the Northern Pacific road. He took the ground that he wanted to run his trains into St. Paul over our line, and I didn't see at that time my way clear to make any special arrangements with Mr. Wright for that purpose; and it was finally agreed between him and I and Mr. Sargent—the then general manager—that everything from their end of the road should be run to Sauk Rapids, and we would handle it promptly, both freight and passengers, and they would do the same from our trains at Sauk Rapids, and take it to the point of destination of their road.

That continued for some length of time, and when a settlement was necessary between the two companies, Mr. Sargent and myself couldn't agree about the division of the through rates from their road to ours, and from our road to theirs, and after a good deal of talk about it his auditor would make out one statement and our auditor would make out another, so we didn't agree by a very large difference, and it finally resulted in an arbitration. I repeatedly said to Mr. Sargent that I was familiar with that kind of traffic, and my position was a correct one. He, failing to agree with me, after repeated efforts on my part to get Mr. Sargent to arbitrate the matter by experts, he finally agreed to do so.

I selected Joseph Tucker of the Illinois Central—traffic manager of that company. I knew him very well. He was a man I had a good deal of confidence in, his ability and fairness and everything else, and Mr. Sargent selected Mr. Harris,

who had formerly been general manager of, I think, the Burlington and Quincy. After some correspondence, on my part, with Mr. Tucker, I don't know what Mr. Sargent done with his choice, Mr. Harris; don't know anything about his correspondence,—but they both appeared here. Our matters of disagreement were submitted to them, which took, I believe, the greater part of two days, was fully discussed and was finally settled to my satisfaction, but not to the satisfaction of Mr. Sargent.

However, upon the basis of their agreement, and the manner in which we would settle, Mr. Sargent and I did have a settlement, and from that time up to the final closing up of all the difficulties, the unpleasant feeling continued. I was consulted by all the parties on our side, what would be fair and right, to let them run into St. Paul over our track,—Mr. Stephen particularly.

As to Mr. Hill's testimony substantially, that the general differences between these two properties or the representatives thereof was the subject of negotiation, and that some basis of settlement and agreement was eventually arrived at,—I knew all about it; not that I came to the front, but I was consulted in regard to what would be a fair rate to charge them for use of our road and doing business here. We set apart part of the warehouse for them to do their business in their own way, and to receive their freights in St. Paul and do their business, and they done it their own way as far as freight was concerned. To the best of my recollection the tickets were sold in our ticket office.

On this general subject of differences between the Northern Pacific property and the property represented at the time the negotiations were going on, I conversed freely with Mr. Hill, Mr. Stephen, and possibly Mr. Kennedy. On the other side of the difficulty, I had but very little to say to those gentlemen. Mr. Hill and Mr. Stephen and all concerned on our side of the question, seemed to have a great deal of confidence in my ability to advise what was a fair and reasonable proposition on our side, and it was very freely spoken of and conversed, and I think the most of their ideas were gotten from my experience in the matter. I knew about what was right, and they was to pay so much for the use of the track and renewals and repairs, and pay their proportion of the renewals and expenses of keeping it up, according to the amount of cars and wheels run over the track by the respective companies. If we run more

trains than they did, we were to pay the greater share of keeping up the track in repairs; they were to do the same on the other hand.

I was familiar with things of that kind in Iowa, and talked with Mr. Tucker a great deal about those things, and to Mr. Hewitt of the Northwestern road. I think they consulted me very freely on that subject; and as to coming to the front and talking to Mr. Billings and Mr. Wright and those gentlemen that were here, I do not think I did.

As to Mr. Hill's testimony in answer to question 612, on direct examination, (690) that: "Mr. Farley went to New York on that occasion at my request. Judge Dillon at our first interview had intimated that a contract to build the road in sections to be paid for in debentures, as indicated by the commissioners—Mr. Reynolds and Mr. Henderson—would meet his approval. Mr. Farley objected to this method; said he wanted to build the road. Judge Dillon had also stated in Des Moines that if he gave any order—that is, at his final interview with Judge Young, Mr. Farley and myself — Judge Dillon stated that if he gave any order, he would only make the debentures to be issued after the entire work of the season was completed. I wanted to confer with my associates as to whether we would undertake the work on these terms, *and I wanted to get Mr. Farley to New York, where I thought Mr. Kennedy would prevail on him to modify the statement he had made to Judge Dillon.* When in New York, Mr. Farley sent a message to Judge Dillon on that subject." Mr. Farley testified (1667-8):

"According to my best recollection, I do not think that I ever suggested to Judge Dillon any particular method of building the road. If the money was forthcoming, I knew how to do it if he ordered me to do it, and it was a matter of no consequence to me whether it was paid for in sections, or when it was completed. I do not believe Judge Dillon ever made any such suggestion. The whole tenor of his talk in this connection would indicate something different. If he had ever suggested that the road be paid for in ten-mile sections by debentures, I should very readily have done it. I do not think he ever suggested it."

As to the testimony of Mr. Hill (625–6) as follows:

"Q. 350. After your return from New York in January, 1878, and while Mr. Kittson was in St. Paul, what conversation, if any, was had between Mr. Kittson and yourself, or Mr.

Kittson alone, with Mr. Farley in regard to your having acquired, or being about to acquire, these bonds?

A. As I recollect Mr. Kittson told me he had met Mr. Farley and had some conversation with him about our having finally agreed with the committee; that in talking with Mr. Farley the matter of Mr. Farley taking a small interest in the enterprise was mentioned. Mr. Farley said he had no money to put into such an undertaking; and Mr. Kittson replied, as he stated to me, that it would take a barrel of money,—or a big lot of money, to carry out the proposition made to the Dutch committee."

And on cross-examination (719), speaking of such alleged conversation between him and Mr. Kittson, as follows: "C. Q. 719. Did Mr. Kittson tell you what had led him to mention the subject to Mr. Farley of Mr. Farley taking an interest in the enterprise? A. I think he stated it was 'chaff' between him and Mr. Farley. I think he used the word 'chaff' or that he was 'chaffing with Mr. Farley at the time.'"

To Mr. FARLEY: Did Mr. Kittson ever hold with you any such conversation as is thus related by Mr. Hill?

A. He never did, sir; Mr. Kittson was not a chaffing man. Such conversation never took place between Mr. Kittson and myself.

MR. FARLEY ON REBUTTAL.

As to the through rate on traffic over the Pembina branch from the boundary line to Winnepeg, made by me as receiver, in connection with Upper and Willis, the contractors for the Canadian government on the Pembina branch, whereby freight or traffic should go over the lines in my charge, through to Winnepeg on some through rate arrangement with said contractors.

Mr. Farley testified:

"Mr. Hill was the first man that ever suggested that thing to me, and asked me to make it; it was done according to Mr. Hill's request.

That through rate was rescinded a very short time after it was inaugurated, at the request made to me, I think, through Mr. Kennedy, but it was Mr. Stephen's wish that it should be

so—should be rescinded. It was something that was annoying him in Canada, about leasing that line. I think I got my first intimation through Mr. Kennedy. It was unpleasant for Mr. Stephen, and he wanted it rescinded, and I did so as soon as I found that it was the fact." (1,668.)

On cross-examination, Mr. Farley testified (1,676):

"With reference to the through rate which I made with the contractors on the Pembina branch, it was in the winter of 1878 and 1879, and soon after the road was opened for traffic to the international line; the precise date I cannot give, but it was soon after the road was opened for traffic.

I do not think I had an interview with the parties in the Dominion that was controlling the road from the international boundary line to St. Boniface; do not know that I had any interview with them at all; I think my assistant, Mr. Fisher, had more or less interviews with them; I had no interviews with anybody on that subject but Mr. Hill.

Mr. Stephen, I think, posssibly, sent me a telegram from Montreal requesting me to rescind the rate, before I had any letter from Mr. Kennedy. I was satisfied the making of that through rate was unpleasant to Mr. Stephen, and as soon as I found that fact out, I rescinded it. I am sure Mr. Kennedy wrote me a letter, in which he stated he was in receipt of a letter from Mr. Stephen, and it was his wish that rate should be rescinded, and it was done at once.

As to the letter to Mr. Farley from Kennedy & Co., February 15, 1879 (320): "That I think is the letter I have reference to, that Kennedy sent me; I think so. Evidently Mr. Stephen must have telegraphed me from the language of that letter; no doubt but what he did.

As to how long the rate was in force after it was established, and before I was requested to withdraw it would be very difficult for me to state; even from the 1st of January up to this date in February it would be a very short time, but I do not think it was made as early as the 1st of January. They finished their line some weeks after we finished to St. Vincent. It was some weeks before they got their line completed. They finished very late in December, Mr. Hill and Mr. Robbins went and helped them finish their line. They used about sixteen thousand ties that I had bought for our line that was left over, so I know it must have been sometime after we finished there, before theirs was completed to do any traffic; that is my recollection.

My recollection is it was in force but a very short time; I couldn't tell whether it was two weeks or four weeks, but it couldn't have been in force but a very short time; that is my recollection about it."

As to the final issuing of the debentures (referred to in Mr. Hill's testimony, 828), Mr. Farley testified:

"I did everything that Mr. Hill and Mr. Stephen asked me to do to secure the balance of these debentures, anything and everything that was within my power that was right and proper. I did it without any urging." (1,674, 1,678-9.)

Mr. Farley.—1879.

Mr. Farley testified:

I never had any business with the foreclosure suits, but my recollection is that the foreclosure suits were early in 1879. They closed early in 1879. It is something I seldom trouble my head about. I was taking care of the property.

Before those foreclosure sales, say in the winter of '78 and '79, I had very frequent conversations with Mr. Hill. In addition to the general prosperity of the property, present and future, I had been urging upon Mr. Hill particularly, and said a good deal to Mr. Kennedy about it, the necessity of purchasing this stock to hasten the foreclosure.

I refer to the stock of the St. Paul and Pacific and First Division Company—stock held by Mr. Litchfield.

I mean the capital stock of said companies, which, I understood, was all held by Mr. Litchfield, or nearly all; and along about or previous to that date there had been some effort, I think, made in the courts for foreclosure.

They finally concluded that they would make an effort to secure that stock, and hasten the foreclosures. That, I think, was early in 1879, or about that time.

As I stated before, as I understood it, they made up their minds to visit New York in connection with Mr. Stephen and Mr. Kennedy, and to make an effort to secure that stock. About that time Mr. Kittson came to me, and urged me to go down there; that I understood this matter better than anybody else. I had said so much about it, he thought it important I should be on hand to assist in the purchase of that stock. I refused to go, and gave my reasons for it; that the Messrs.

Litchfield was well acquainted with me as a railroad man in Iowa before coming to Minnesota; and my presence there in helping to secure that stock from them would give them a great deal more confidence in the worth of it than if I would stay at home, and mind my own business; that Mr. Kennedy & Co. could manage that business for us and them very much better than I could.

I did not go to New York on the visit which was made to purchase the Litchfield stock.

I recollect distinctly that Mr. Hill went; whether Mr. Kittson went or not I don't know. Mr. Kittson was a man that was not well informed in matters of this kind, and didn't wish to make himself very prominent in matters of this kind.

After Mr. Hill's return from New York he notified me that they had accomplished the object for which they went there.

About the time of the purchase of the Litchfield stock and holdings, I had conversations with Mr. Kittson and Mr. Hill, both of them frequently—more particularly with Mr. Hill.

So far as the Litchfield stock was concerned, I had frequently urged upon Mr. Hill and upon Mr. Kittson, as often as I had an opportunity—and John S. Kennedy & Co.—the necessity of controlling that stock. As I learned from the attorneys, the time of foreclosing and reaching a sale of said property under the foreclosure suits then pending, was very uncertain. I saw the necessity of controlling that stock, to expedite the foreclosure proceedings, and getting the possession of the property under the sales. Mr. Kittson and Mr. Hill didn't seem to attach the same importance to this matter that I did myself. Messrs. Kennedy & Co., through bad feelings towards the Litchfields, caused them to interpose objections, and said to me (no doubt they did to Mr. Hill and Mr. Kittson) that the Litchfields were not entitled to anything for that stock, and urged that the foreclosure sales would cut them off, and would place them, so far as the value of the stock was concerned, where it ought to be. It was after a great deal of talk on my part that they were induced to see if they could not—and did purchase it.

Very soon after the stock was purchased of the Litchfields, and it was understood that we controlled both sides of this lawsuit—these foreclosure suits—I called at Mr. Kittson's office on Third street (I think the same place his office is at present). After talking about the success of getting the stock, etc., and having everything fair sailing, as we called it, I men-

tioned to Mr. Kittson that I was an old man as well as himself, and it might be several months before this property could be put in shape, that each individual would be entitled to be awarded their shares, and suggested to him that our previous understanding about my interest ought to be put in writing—black and white, as I called it.

Mr. Kittson remarked that he thought the suggestion a good one, and would see Mr. Hill; we three would get together, and reduce our understanding to black and white.

To the best of my recollection, he made an appointment that he would meet me in his office with Mr. Hill the next day at 2 o'clock, and attend to this agreement being put in black and white.

Before I left the office he remarked to me that Mr. Hill had been talking to him, and thought that my interest should not be equal to theirs. I won't be positive whether he said "quite equal" or "equal;" that they, Mr. Kittson and Mr. Hill, unexpectedly, at a certain time in the negotiations that had been pending, had to raise some money; and in order to raise this amount of money necessary, they had to mortgage everything they had, and had not called upon me to raise my share of it; and if the thing had been a failure, that he himself would have to go to the poorhouse. Mr. Kittson—after Mr. Kittson had made these remarks, he saw that I felt indignant; when I told Mr. Kittson it was no part of the contract that I should raise any money; but if it had become necessary, with this property behind me, I could raise as much money as him or Mr. Hill either, and he gave me no opportunity to do so. Mr. Kittson saw that I was somewhat excited over his remarks,—what Mr. Hill had said; and said to me, "Mr. Farley, you know what Jim is as well as I do, and it is all right."

I left his office with the impression that I should have an interview with these two gentlemen the next day at his office at the time appointed—2 o'clock.

I went to Mr. Kittson's office at the time appointed, and to the best of my recollection, I remained in his office, in the neighborhood where I could see him if he came in, about one hour. Mr. Kittson didn't make his appearance, or Mr. Hill either. I came downstairs and stood on the pavement on Third street, in front of his door, a few moments, supposing that Mr. Kittson might come along. On looking up Third street, on the south side I saw Mr. Hill and Mr. Kittson, arm in arm, walking away from the office, and from where I was.

I didn't conceive it necessary to wait for them any longer, and went home to my office and attended to my business.

I was feeling unpleasant over the matter, and sent a note to Mr. Hill's house, for fear I might not see him. In said note I asked him to call at my office at 7 o'clock that evening.

Mr. Hill did call, as I requested him; I informed Mr. Hill the object I had in view in wishing to have an interview with him. Mr. Hill, in his way, said to me, when I urged upon him the necessity of reducing this matter of our understanding to black and white, it was all right. "Farley, you know I'll never go back on you," but was unwilling to do it at that time, urging that they, Mr. Stephen, Mr. Smith and Mr. Kennedy, were all interested with us, and wished to wait until they came out, which would be in about ten days; we would all get together then, and fix this matter up; I said to Mr. Hill: "I have no contract with Mr. Stephen, Mr. Smith or Mr. Kennedy; my contract is with you and Mr. Kittson," and couldn't see the necessity of waiting for those gentlemen to come out; his reply was that they are all interested now—we are all interested together, and would do nothing until they came out; and, to the best of my recollection, those gentlemen did come out ten or fifteen days later than that; and when I suggested the idea of getting them together, as he had stated, he made light of the matter, and it passed over, and we had no meeting at all. I saw that he intended to ignore my interests entirely, and all he said to me before was only to let me down as easy as he could.

That was the last of my efforts to have a friendly and amicable arrangement with Messrs. Kittson and Hill.

Mr. Hill was treating me very coolly at that time in every way, shape and manner that he could.

With reference to the letters, letterpress copies of which appear in my letter-books, and of which copies have been introduced, the matters and things therein stated and written to Mr. Carp and Messrs. Kennedy & Co., were true to the best of my knowledge. I never intended to write anything false.

I never gave those gentlemen any information or ever wrote them a letter, but what it was honestly and faithfully my views of matters and things, to the best of my knowledge.

Cross-examination as to matters of 1879:

I could not give you the precise date of the purchase of the Litchfield stock. It was early in 1879, as I recollect it. (159.)

I understood the same parties held a lot of bonds, but how much I could not state. The whole thing was looked upon by us as something that did not cost them anything, and they were not entitled to much. We never talked about anything but the stock. That was the interest opposing the foreclosures.

I could not state the number of days after the return of Mr. Hill (when I generally understood the purchase of this stock had been made) the conversation between Mr. Kittson and myself took place, in which I asked to have my agreement with him and Mr. Hill put in black and white. A very short time after that I called on Mr. Kittson. Couldn't state the number of days, however.

Within a month after Mr. Hill's return, I think it was, sir.

Well, Judge, whether as early as the 1st of April, 1879, I couldn't tell you exactly about it; only I know when it was generally understood this stock was purchased I called on Mr. Kittson.

My conversation with Mr. Kittson was a very short time after it was understood generally that the Litchfield interest had been purchased; that is all I can tell you about it. It was a very short time after that was generally understood.

It was before the first of the foreclosure sales, sir, to the best of my knowledge.

I cannot place it any more definitely than I have done.

The business in hand was important to me.

As I recollect it, it was only about two days—my first conversation with Mr. Kittson, and then his failing to meet me and Mr. Hill as he agreed to—immediately after that I sent for Mr. Hill. He met me in the office at 7 o'clock in the evening.

I had no conversation with Mr. Hill after that interview, because he put off the final arranging this in black and white, as we call it, until Mr. Stephen and others came out, which was looked for in about ten or fifteen days.

They were expected out on business connected with the foreclosure suits here, sales, etc.

Whether they attended all the foreclosure sales I couldn't recollect. Mr. Barnes was here part of the time alone, and they were here, but whether they attended all the sales or not I could not tell.

I couldn't say, sir, whether it was the first or second foreclosure sale.

To the best of my recollection I had some little talk with Mr. Stephen, but a good deal of talk with Mr. Kennedy, on the subject of the matter that Mr. Hill had promised me. It was on the occasion of their being here.

As a witness called by defendants:

As to the conversation had with Mr. Hill in the spring of 1870 when he came to my office in the evening in answer to a written request—I couldn't fix the date very definitely, only this fact—it was after the purchase of the stock from the Litchfields had been accomplished; very soon thereafter.

According to my best recollection it would occur before that date, the date of May 23, 1879. I know it was very soon after it was known that the stock of the Litchfields interest had been bought by the syndicate.

As I have before stated it was previously to Mr. Kennedy and Mr. Stephen making their appearance here in St. Paul. I know at the time they were expected and did come—as Mr. Hill said they were coming in eight, ten or fifteen days, but as to the precise time, I couldn't state, Judge. It was after the Litchfield stock had been purchased.

The interview took place to a certainty, and Mr. Hill, I believe, in his testimony, don't deny it. I am not prepared to say it was prior to the organization of the Manitoba Company, but the conversation I have narrated between Mr. Hill and myself, and also between Mr. Kittson and myself, is substantially correct—but the time I couldn't undertake to say.

I have no recollection now, sir, of having written any letter to Mr. Kennedy within a few days after that interview with Mr. Hill; but I looked to Mr. Kennedy largely to see me righted in this matter. But about writing him any letter, I do not recollect it. I may have done so. I know I talked with Mr. Kennedy a great deal when he came out at that time.

If I wrote any such letter, I stated what was my belief and and impression at the time the letter was wrote. I never intended to write anything that was untruthful.

At this evening interview between me and Mr. Hill, I recollect, on my part, of talking very plain to Mr. Hill and I could almost use the words if you want them. As to the use of any sharp language, I do not think it was, on the part of Mr. Hill. He kept telling me it was all right; to wait until these gentlemen come out and we would settle that matter. They were all interested alike with us. Mr. Hill was very

meek on the subject if I recollect it. I do not think he used any harsh language.

In my mind it was equivalent to ignoring my rights, because I said to him, 'I have no contract with Mr. Kennedy or Mr. Stephen. My contract is with you and Mr. Kittson.' I could'nt see the necessity of delay. In my mind it was equivalent to a denial, you know, but at the same time he kept saying it was all right."

Mr. Farley was then shown the letter by himself to J. S. Kennedy, dated May 29, 1879, and was asked if he wrote and signed it; and he replied that he did.

"Q. Have you read that letter from beginning to end at this time?

A. I have looked it over; yes, sir."

Also Mr. Farley was shown the letter from Mr. Kennedy to himself of May 26, 1879, (322), and stated it was, he thought replied to by him in the letter of May 29, 1879, (1401).

Mr. Farley's attention was called to the passage in his own letter:

"Pressing business compels me to be absent a few days.

"I have had some sharp talk with Mr. Hill. If he persists in his present course to ignore all my claims to share in the honors or profit to some small degree he may have cause to regret it.

"I hope to be back early next week."

(Continuing): My impression now would be that my evening interview with Mr. Hill was before the date of this letter, the 29th, but how long before that I could not state.

As to the expression in this letter—'all my claim to share in the honors or profit to some small degree,'—Mr. Hill's disposition (from what Mr. Kittson had previously told me) to put this thing off, looked to me very much as though he didn't intend to do what he agreed to. I called his attention to the fact that I couldn't see the necessity of waiting for Mr. Stephen or Mr. Kennedy. And another fact was, that I learned from Mr. Hill in that interview, that other parties had come into this scheme, you know, and, as a matter of course, *I was always in favor of divding it up into smaller parts than he was willing to* —by fifths—and at that time I felt that I was willing to be gov-

erned by whatever was right under the circumstances—what Mr. Kennedy might think was right. I have no further explanation to make than I have stated. (1402.)

On the direct examination of Mr. Farley, as a witness for the defendants, regularly called and sworn as such (1549), he was asked, referring to bill of complaint herein (see Q. 289, page 1415, and bill, section 1, page 5 of record):

"And I ask you what services and what co-operation on your part were indispensable to the success of said enterprise?"

In reply to that question and many subsequent questions on the subject, Mr. Farley stated in answer to defendants' counsel, and without objection by either side (Q. 289 to 296) conversations with Mr. Kittson and Mr. Hill, and the entire subject of "services and co-operation," was inquired about, notwithstanding the death of Mr. Kittson on May 10, 1878, before Mr. Farley was made a witness for the defendants.

On cross-examination Mr. Farley's counsel considered it proper to examine him upon the same subjects inquired of on direct-examination as above stated. He testified on the subject of the services to and co-operation with Mr. Kittson and Mr. Hill quite fully. (1,426 to 1,439.) Whether that co-operation and service was "necessary to the success of the enterprise," is not the material issue—the question is, was the service solicited, regarded and accepted at the time, as a valuable one, and was it rendered in good faith? Defendants having gone over the question, it was proper to cross-examine upon it. Among other things, Mr. Farley testified (1,427):

"I had interviews with Mr. Hill very frequently. I had interviews with Mr. Hill and Mr. Kittson together on the subject. We had many talks. I had interviews with Mr. Kittson alone, and in all of these conversations they manifested no evidence to me that they was very well posted about matters of the kind that we had in hand. During the year 1876 and during the year 1877 those interviews continued and these talks continued. I couldn't state that they were any more frequent in 1876 than 1877; possibly might have been.

Those interviews referred to, some of them, may have been very lengthy and some of them very short; but as I have stated before, they occurred very frequently.

Mr. Hill and Mr. Kittson together would come into my office for the purpose of talking this matter over. Mr. Hill was almost a daily visitor when I was in town and he was here; and most always had something new to say or suggest about this matter.

He came so often that he was satisfied himself I was a very busy man—had a great deal to do—a great deal to think about in connection with the care of the property.

He saw that I was not prepared to talk with him; and he got in a habit finally of coming to my office just before dinner; he kept that habit up for some time; I cannot say how many days or weeks, and walking with me from the office to my hotel—which was the Metropolitan above here—to discuss these matters.

Very frequently when we got to the end of our journey Mr. Hill had so much to say that we would stand there near the door and talk about the matter.

I finally found there was one way of getting rid of Mr. Hill, that was to insist upon his going in to get his dinner with me; he never would do that. Pretty soon after that he would leave.

On one occasion I recollect distinctly—we generally traveled on the south side of 3d street from the office to the hotel—I stopped right in front of the First National Bank, and called his attention to what I had frequently mentioned before—of having more parties interested in this syndicate, for the influence it would have in the State of Minnesota, and particularly with the legislature of Minnesota, and suggested the name of Horace Thompson—he emphatically stated that we didn't want him. "You and Mr. Kittson and myself can handle this thing"—and with a kind of visionary view of the case peculiar to himself, he broke out into a strain like this: that when we got possession of this property, it would be a grand thing; with two such old men as yourself and Mr. Kittson, with the reputation you have got, at the head of it—it would be the grandest thing on earth; something of that kind.

Mr. Kittson is a man that I didn't so often see, but occasionally Mr. Kittson would seek an interview with me separate, because, for reasons that I understood, he seemed to have a great deal of confidence in my judgment, and fre-

quently gave me credit for working wonderful things in the bettering of this property that I had taken hold of; and occasionally he wanted to talk with me about matters that he didn't care about "Jim," as he called him, understanding or knowing, and did on such occasions seek an opportunity to find me privately.

And I do not know as it is proper for me to state, Mr. Kittson told me that he hadn't a great deal of confidence in Mr. Hill; while he had a great deal of confidence in his ability, shrewdness and tact, he didn't have a great amount of confidence in his honesty, and relied upon me to take care of things generally.

Down to the purchase of the Litchfield stock, they never gave me to understand, by anything they said, that they, or either of them, resorted to the advice, counsel or assistance of any other practical and experienced railroad man in and about said matters than myself.

They never intimated to me that they were consulting with anybody on the subject but myself. If they were doing so, I didn't know it. I think they both had that confidence in my judgment that it would hardly be necessary to go outside of what I knew about railroads; if they did so, they didn't notify me of the fact.

Mr. Kittson never, at any time, face to face with me, denied to me that I was interested with him in and about the enterprise of purchasing said bonds and acquiring said railroad property.

There was never any personal feeling between myself and Mr. Kittson. I as frequently saw Mr. Kittson and had interviews with him on the current events of the day, when I was in St. Paul, as any other old acquaintance. To further substantiate what I have said about our friendship, I would here introduce a letter that Mr. Kittson wrote me.

Suit in the State Court.

Note. Mr. Farley's suit against Mr. Kittson and Mr. Hill in the state court at St. Paul was begun by complaint filed June 13, 1879. (D. Ex., 164, p. 1,569.) That case continued pending, till dismissed without prejudice on October 28, 1880. (C. Ex., 244, p. 1,738.)

The letter from Mr. Kittson to Mr. Farley, last referred to (shown in full, record, page 1.498), contains several very important statements, as bearing upon Mr. Farley's evidence concerning Mr. Kittson. Mr. Kittson's letter, it will be seen, was written January 14, 1880, seven months after Mr. Farley began his suit in the state court against Mr. Kittson and Mr. Hill, and over nine months before it was dismissed, and was a reply to a letter from Mr. Farley of the 29th November, "which I would have noticed before this date, but was prevented by your absence." Mr. Kittson further says:

"I regret that you should have had the impression that I acted coolly towards you, for it is far from my intention to do so—I do not consider the differences between us are sufficient cause to influence our friendly intercourse."

Those voluntary expressions, written in his own handwriting, by Mr. Kittson, not on the spur of the moment, not in Mr. Farley's presence, after the lapse of over a month for reflection before writing them, speak for themselves.

Mr. Kittson was not a pusillanimous man, nor in any sense lacking in dignity of character. There is nothing in the record in this case which would justify the belief that Mr. Kittson would fail to resent with proper indignation a baseless demand upon him, supported only by perjury and subornation of perjury; or that he could be brought to write a friendly personal letter to a man so injuring him, in which he would say: "I do not consider the differences between us are sufficient cause to influence our friendly intercourse."

Recapitulation.

As a recapitulation of complainants case, before noticing the criticisms thereon, urged by defendants' counsel in the court below, we will call the court's attention again to the oral and documentary evidence in the record showing the agreement between the parties to this suit, and the commencement of the

negotiations for the purchase of the bonds, and to the various steps taken to carry out the enterprise which has given rise to this suit.

In this brief we have shown the substantial history and position of the main parties to the matter in controversy, their character and standing, how they came into relations with each other, and the manner in which, in the years 1874 and 1875, Mr. Kittson and Mr. Hill were brought into intimate business relations with Mr. Farley and his then assistant, Mr. Fisher, through the joint carrying of freight and the building of the Spur Track of fourteen miles from Crookston to Fisher's Landing on the Red river, to connect with Mr. Kittson's Line, and the negotiations which took place in regard to the building of the proposed cut-off of 33 miles from Breckenridge to Barnesville.

We have shown the conversations and interviews between Messrs. Kittson, Hill, Fisher and Farley which resulted in the combination and agreement to purchase the bonds, if they could be obtained at prices which would be reasonable.

The letters and documents were followed in their order, and their connection shown with the enterprise so agreed upon from and after the first conversations had with Mr. Barnes, while he was in St. Paul in late March, and in April, 1876.

The first of those documents found in the record is the letter from Mr. Farley to J. S. Barnes, written on June 3, 1876, (1492), in which he stated that N. W. Kittson was getting anxious about the big operation of getting control of the First division, also the Extension line; and further stated that Mr. Kittson could get the money, adding, what do you think can be done? you have his proposition in your memory, etc., etc.

Then followed Mr. Barnes' reply to Mr. Farley under date of June 9, 1876 (252), and his further letter of June 19, 1876 (253), in which Mr. Barnes answered Mr. Farley's inquiries

by saying matters were so complicated that at that time they (Kennedy & Co.) did not see a clear way to the desired object, when the time came and the way seemed at all clear they would confer with Mr. Farley regarding it, etc., etc., and seemed clearly disposed not to entertain favorably at that time the proposition Mr. Kittson had made and which Mr. Farley was urging upon the attention of Mr. Barnes.

The next step in the negotiation was, as already shown, the telegram from Mr. Kittson to Mr. Barnes of August 16, 1876 (992), asking whether the Bondholders' Committee would make an offer fixing the prices upon which they would sell out entirely, allowing the foreclosures to be had at St. Paul—and the reply of Mr. Barnes, by telegram, that he had written to Mr. Farley on the subject that day, August 17, 1876 (957). But the letter of August 17th, referred to by Mr. Barnes, could not be found and is not in the record. Counsel for the defendants stated concerning that letter (a copy of which was not on the letter-books of Kennedy & Co.), that he had learned in New York that the letter was copied on the private letter-book of Mr. Barnes, "and which Mr. Barnes would not permit the defendant to see or take a copy of it." (1693.)

The next document in evidence in reference to the negotiation which was so begun and pending, is the letter from Mr. Farley to Mr. Barnes of August 23, 1876 (1492), in which he stated: "I read your letter 17th to friend Kittson; he feels somewhat disappointed. The old gentleman has great confidence in the future of this property if it can be obtained for the present selling price of the bonds," etc.

Following this as the next actual steps taken, were the conversations by Mr. Farley with Mr. Carp as to the committee selling its bonds, and the introduction by Mr. Farley of Mr. Kittson and Mr. Hill to Mr. Carp, who was a representative

of the Dutch committee, during his visit to St. Paul in December, 1876; and the interviews which followed upon that introduction, first between Mr. Carp and Messrs. Kittson and Hill, and, secondly, between Mr. Carp and Mr. Farley, concerning the proposition as to the bonds being sold to a syndicate in St. Paul (460-1).

This was followed by the making of the first written proposition by Kittson and Hill to Mr. Carp, of January 29, 1877 (529), which was sent to Mr. Carp while he was in New York, and which was, in substance, a proposition to buy the First Division property for $3,500,000 in cash, payable after a foreclosure should have been made by the bondholders and their title made clear, so that they could convey the railroads unencumbered, the bondholders, however, to retain and receive the entire proceeds of the lands unsold, upon which a land scrip to the amount of $7,000,000 should be issued.

This proposition was discussed in the letter from Mr. Barnes to Mr. Farley of February 6, 1877 (276), in which it was stated that Mr. Carp, who was then in New York, was still a little troubled as to the way he should be able to convince the committee that the offer was one which Mr. Kittson and Mr. Hill had the ability to perform; and that Mr. Farley must judge whether or not it was best to suggest to Mr. Kittson and Mr. Hill the advisability of having their proposition endorsed or guaranteed by the capitalists or well known moneyed men or institutions which would give it the necessary amount of weight.

After this followed the second written proposition by Kittson and Hill which was approved by Smith and Stephen (534, Telegram No. 95), and was dated May 26, 1877 (533), as Mr. Barnes had pointed out in his letter to Mr. Farley should be done in order to enable Mr. Carp to convince his committee that the proposition was one proper to be entertained (276).

Mr. Carp testified that Mr. Farley's repeated assurances made to him in St. Paul as to Mr. Kittson, induced him to look into the matter and seriously entertain the negotiation (461.)

The written proposition of May 26, 1877, was addressed to John Carp, attorney and agent of the Bondholder's Committee, Utretcht, Holland, and was for the purchase of the bonds of the First Division and extension lines (533).

We have shown, and we again call the attention of the court to the fact that, at the inception of the negotiation first opened to obtain the prices of the bonds from Mr. Barnes, and at each successive step thereafter in the negotiation—particularly in the correspondence with Mr. Barnes—and in the opening of the negotiation with Mr. Carp, in fact down to the close of the year 1877, Mr. Farley, the complainant, was active with Kittson and Hill, and in every way furthered their enterprise and assisted to put the matter in such shape before the repreatives of the committee that the proposal would be and so that it was at last entertained and favorably considered. Indeed it was only Mr. Farley's connection with the enterprise that induced Kennedy & Co. to give it countenance at any of its steps. And this was clearly so as late as February, 1878, when Mr. Kennedy wrote Mr. Farley that he was glad to hear of his interest, and when the firm letter of Kennedy & Co. stated they should have great confidence in the future success of the enterprise if Mr. Farley should continue his connection with it (317; 994.)

The defendants did not, in the evidence which they introduced, nor did counsel in his brief below, point out any other commencement or inception of a negotiation with the bondholders or their agents, which resulted in obtaining the bonds, than the one with which the complainant was identified, and in which he assisted, as above detailed. Indeed, the record dis-

closes no other negotiation or attempt to negotiate for the bonds or the railroad property.

The testimony by Mr. Farley and Mr. Fisher as to the various conversations with Mr. Kittson and Mr. Hill, taken in connection with the circumstances and documents referred to, and the corroborating testimony of John Carp, constitute the complainant's case. Upon those documents and upon the substantial truthfulness of those witnesses, depends the recovery in this case.

The defendants' counsel apparently realized this to be the situation of the proofs, and accordingly devoted a large portion of his oral and printed argument in the court below, to an attempt to break down the force of that evidence. Counsel tried to show by various finely drawn and, as we claim, farfetched and unfounded arguments and deductions, that the witnesses, Mr. Farley and Mr. Fisher, are unworthy of belief, and in fact that they have wilfully, and with the aid of counsel, concocted and invented the entire substance of what they swore to.

In order that we might place clearly before the court the evidence which was so attacked by the defendants' counsel, we have stated pretty fully, the more material portions of the testimony of Mr. Farley and Mr. Fisher bearing on the contract entered into and the steps taken in carrying it out.

We will now discuss the grounds of objection urged in the court below, to the credibility and conclusiveness of that testimony.

Reply to the Attacks upon the Credibility of J. P. Farley and W. H. Fisher.

The attacks made in the court below upon the credibility of Mr. Fisher and Mr. Farley, were based upon various grounds, which may be succinctly stated as follows:

1. The assumption that a prior scheme by Kittson, Hill, and Smith to acquire the railroad property has been proven; also that Mr. Kittson and Mr. Hill were already in possession of all the necessary knowledge to enter upon and carry out the scheme,—and that therefore Kittson and Hill did not need Mr. Farley's advice or services, and therefore the conversations could not have taken place in the spring of 1876, between Kittson, Hill, Fisher and Farley, as testified to by Fisher and Farley.

2. The assumption that Mr. Farley did not have and was not in a position to have, the information and knowledge of the property of the two railroad companies, at the time in the spring of 1876, when the main interview occurred with Kittson and Hill, as was testified to by Farley and Fisher.

3. The claim that the error made by Mr. Fisher and Mr. Farley in stating the date when the main interview in question occurred, was not a mere error of recollection, but an intentional placing of that interview in August or September, instead of March or April, 1876,—and that it was done on account of the situation of affairs generally, and the pendency of the Litchfield agreement in particular.

4. The claim that the testimony by Mr. Fisher and Mr. Farley that Mr. Hill once wished or suggested to send a man to Holland to buy the bonds, but concluded to await Mr. Carp's visit, is a fabrication, and proven to be so because of the date when Mr. Carp came out, and because of the time when it was first known he was coming.

5. The claim that Mr. Kittson and Mr. Hill could not have had the interview with Mr. Fisher, as testified to by him, in which Mr. Kittson and Mr. Hill insisted upon a telegram being answered in Mr. Farley's name,—Mr. Kittson at the same time referring to Mr. Farley's interest with himself and Mr. Hill as a reason for so doing.

6. The claim that because Mr. Farley bought jointly with a friend in Dubuque, through John Carp, some bonds held in Holland, and afterwards sold them—that this shows he was not interested with Kittson and Hill.

7. The claim that Mr. Farley's statement that he made an error in fixing the date when the premature newspaper publication was made, of which Mr. Kittson complained, is not warranted by the facts, and that it was not an error, but a pure fabrication of the entire incident.

8. The assumption that Mr. Farley's letters to Kennedy, or Kennedy & Co., tend to show he had no agreement or understanding as to his interest with Kittson and Hill.

9. The claim that John S. Kennedy's testimony as to conversations with Mr. Farley, taken with the letters last mentioned, contradict and disprove Mr. Farley's testimony in this case.

10. The assumption Mr. Kittson could not have requested Mr. Farley to go to New York to assist or advise in the Litchfield settlement, because the settlement was known to Mr. Kittson to have been agreed upon and substantially made some time before the visit to New York for the purpose.

11. The claim that the method of treating and controlling Mr. Farley, or dictating to him, through Kennedy & Co., adopted by Mr. Hill and the other associates, after the written agreement for a division of interests was made in January, 1878, shows Mr. Farley was not interested with Kittson and Hill.

12. A number of other, though minor points of criticism of Mr. Farley's testimony and claim were made, but they were not clearly defined—nor so constantly referred to in many forms and connections in different parts of the brief of counsel, as were the ones already referred to. The minor points to which we refer were such as:

(1.) The assumptions and conclusions that Mr. Farley had no definite knowledge after the bonds were bought, of what his interest was in the syndicate.

As to this we remark, no definite, and no written agreement was made between any of the associates, until January, 1878,—and we will discuss this more fully when we come to Mr. Hill's deposition.

(2.) The claim that because Mr. Farley put an end to Mr. Hill's wood contract on becoming general manager; and because Mr. Farley required certain guaranties and assurances as to finances, before proceeding with the contracts and work of construction on the lines under the order of the court, after the bonds had been bought by the associates—that, therefore, Mr. Farley had no interest in the enterprise with Mr. Kittson and Mr. Hill.

In these matters Mr. Farley showed complete honesty and uprightness—and a disposition to be faithful to the trust committed to him—a thing the defendants' counsel seemed to regard as a show of treason to Mr. Hill and the other associates.

(3.) The claim that Mr. Farley should have brought into court to testify for him some persons (if any) whom he told of his interest with Kittson and Hill in 1876, 1877 or 1878.

As to this, we simply say we did not resort to hearsay and incompetent testimony, as counsel suggested in his brief below we should have done, either on this or any other point—

nor to a constant practice of asking leading questions, as our opponents have done.

(4.) The assumption and charge that this a blackmailing suit, and that it differs essentially and materially in point of fact or equity from the suit begun at law in the state court.

As to this, we leave the court to judge without argument on our part; merely remarking that the pleadings in the suit at law and in this suit, drawn, of course, by counsel, set up substantially the same claim and the same facts.

In formulating these several points of objection or criticism, which we have gathered from the mazes of counsel's brief in the court below, we have felt obliged to use our own language, for the want of any definite or succinct statement of them in the brief of counsel.

In making our reply to the various points of objection to Mr. Fisher's and Mr. Farley's testimony, which counsel relied upon below to show that those witnesses are not worthy of belief, we shall leave the 8th and 9th points as to Mr. Kennedy, and letters to Mr. Kennedy, to be discussed when we come to consider his deposition; and we shall leave the 10th and 11th points, the Litchfield matter, and the controlling of Mr. Farley, to be discussed when considering Mr. Hill's deposition, (*infra*, p. 264 & 279-83.

As to the group of objections stated under the 12th head, we shall forbear to make any further reply than the suggestions already above made. But as to the points of objection or attack upon the witnesses, above numbered from 1 to 7, inclusive, we will, in their order, now make such reply as seems to us justified by the proofs.

The first point we will mainly consider when dealing with Mr. Hill's deposition, but will now make some remarks upon it. That point is:

1. The assumption that a prior scheme by Kittson, Hill

and Smith to acquire the railroad property has been proven; that Kittson and Hill were already in possession of all the necessary knowledge to enter upon and carry out the scheme, and therefore they did not need Mr. Farley's advice or services, and therefore the conversations could not have taken place in the spring of 1876 between Kittson, Hill, Fisher and Farley, as the last two testified.

The position is a purely argumentative one, based upon the assumption that there was a prior scheme under headway, and that the information necessary had been already obtained, and that there would be no use for Mr. Farley's information, advice or services in the matter. We do not propose in this part of our argument to go into an examination of the proofs by which it was attempted to show there was such a prior scheme, and that the information had been already obtained by or before the spring of 1876, but shall leave the consideration of that alleged proof until we come to discuss Mr. Hill's testimony and the alleged corroboration upon that subject. We will be able to show, we think, that all there was to the prior scheme up to 1876 was the matter of two projected railroads, consisting of:

(1.) The project by Mr. Delano (former superintendent of the First Division Company), which he conceived to acquire the Brainerd branch land grant and the grading, being the partly constructed line of some sixty miles which the money of the bondholders was supposed to have paid for; in pursuance of which scheme Mr. Delano had procured a charter under the name of the Western Railroad Company of Minnesota, and in which he was the first director named, and in which Mr. Kittson, Mr. Hill, and Mr. Hill's partner, were also directors with him, and which company was organized in January, 1874; and pursuant to which scheme Mr. Delano became a member of the legislature and introduced his forfeiture bill to forfeit the land grants on all the exten-

sion lines, and to regrant them to other companies; and which Delano scheme is fully set forth in his own words in a speech sent to Mr. Smith in the spring of 1875. (1273. His plan stated, p. 1294.)

(2.) The further railroad scheme by Mr. Hill, Mr. Kittson and other friends, consisted of a project in which Mr. Farley personally assisted and advised with Mr. Kittson more particularly, and which is known as the Red River Valley Railroad Company, chartered to build the cut-off or Link from Breckenridge to Barnesville (connecting the main line with the extension lines), and under which charter the Spur Track road of fourteen miles was built from Crookston to Fisher's Landing, to there connect with Mr. Kittson's line of steamboats on the Red river.

This latter enterprise was started in the spring of 1875, and the spur track was built in the fall of 1875.

We believe we will be able to show the court that those enterprises were all the prior railroad schemes in any way relating to the property afterwards acquired, and with which Mr. Hill, Mr. Kittson, or Mr. Smith had anything to do prior to the spring of 1876.

But the details of the evidence necessary to demonstrate such to be the fact, will be considered under our discussion of Mr. Hill's testimony.

We believe we will be able to show in the same connection, that the information Mr. Hill alleges had been obtained down to the spring of 1876, was only such as would come to Mr. Hill in pursuance of the other schemes just referred to, and that he had no special preparation for the larger, widely different, and general project which was entered upon in 1876, in consequence of the combination then made with Mr. Farley, by himself and Mr. Kittson.

If the view of the matter which we here take is correct, or

substantially correct, the statement in the testimony of Mr. Fisher and Mr. Farley of their interviews with Kittson and Hill, bearing on the degree of knowledge the two latter had acquired up to the date of those conversations, needs no further substantiation and requires no further comment.

But, for the sake of argument, admitting the theory that Mr. Kittson, Mr. Hill and Mr. Smith had a Prior Scheme, as is alleged, a thing utterly improbable and unfounded, as the proofs will show, still the reflection remains and is conclusive, that there is no evidence and no pretense that they communicated that fact of a Prior Scheme to Mr. Farley or Mr. Fisher at any time—so as to render their testimony (on the above assumption) knowingly false. And, indeed, the evidence is in the record that Mr. Kittson once stated in the presence of Mr. Farley and Mr. Fisher that he, Mr. Kittson, had once looked into the Delano Scheme, and that it came to nothing, or words to that effect. (1,373, 1,653.) There is no denial by Mr. Kittson, of course, of this evidence—and even Mr. Hill did not deny it. When Mr. Farley was a witness called for the defendants, he was examined about this very matter—the testimony being perfectly competent, though after the death of Mr. Kittson, because it was called for by the defendants while complainant was their witness—that testimony being as follows:

Q. 96. So far as you know were you aware that Mr. Kittson had what might be called a project or big operation on hand for buying these bonds prior to your meeting with him at the time the combination was made?

A. I had no knowledge of Mr. Kittson's views personally on that subject until that meeting. On that occasion he told there, in the presence of myself, Mr. Hill and Mr. Fisher, that some time before that he had had a good deal of talk and figuring with Mr. Delano about becoming the owners of the Branch Line property, but it resulted in nothing—it didn't amount to anything. (1,373.)

On rebuttal Mr. Fisher testified to substantially the same effect. (1,653, Q. 1.)

As there is no evidence to the contrary of those statements, the defendants are, we think, absolutely bound by them, especially after having called the complainant as their witness, and having asked him the question which brought out the responsive answer Mr. Farley gave. And we may remark by the way, that that statement by Mr. Farley finds corroboration at many points in the testimony even of Mr. Hill,—and with the documentary evidence in connection with the admissions of Mr. Hill, made on his cross-examination, the fact is established beyond cavil, even though Mr. Farley had not testified to it.

But assuming, as already stated, for the sake of argument, that there was a Prior Scheme, of the character set up, we still insist that it is not an answer to the complainant's case, and does not meet the proof that Mr. Kittson and Mr. Hill entered into a positive agreement with the complainant, in the presence of Mr. Fisher, and that thereafter the negotiation was entered into, assisted by Mr. Farley, by which the property was acquired through a purchase of the bonds.

Considering the situation of affairs as they then stood, *it is altogether probable, in any event*, that Mr. Kittson would want some one of practical and known railroad ability interested with him.

The whole enterprise was then new, (the difficulties surrounding it form part of Mr. Hill's story of the events), and its outcome at best was uncertain, in fact, very doubtful; and what was necessary to be done, and what steps would be most advisable, and most likely to lead to the results wished for, were at that time clouded by the mystery of the future, and were not such as they would seem, and do now seem, in the light of subsequent events, after all uncertainties have been cleared away. All such events were then part of the future.

Neither Mr. Kittson nor Mr. Hill were men at that time of practical railroad experience. The property was in the hands

of men who had experience. The persons to be dealt with were experienced. Mr. Kittson and Mr. Hill would naturally desire to be, as it were, on the inside in a matter of that character and that magnitude.

The mere statement of these things, overwhelmingly proven, would seem a sufficient demonstration of the matter. The relationship indisputably proven to have existed between Mr. Farley and Mr. Kittson as early as the fall of 1874, and the events which thenceforward took place, constitute a set of circumstances which render the pretense that Mr. Farley was by Mr. Kittson and Mr. Hill kept at arms' length and as a stranger to their deliberations and consultations, altogether improbable,—even if there had been a scheme going on before those circumstances arose. The matters should be looked at they stood at the time, and as they gradually developed towards their completion.

2. We will now examine the assumption made in the court below, that Mr. Farley did not have and was not in a position to have the information and knowledge of the property of the two railroad companies, at the time in the spring of 1876, when the main interview occurred with Kittson and Hill, as was testified to by Farley and Fisher.

Mr. Farley was not in a position to have *all the information* which was discussed and taken into consideration at the main interview, until very shortly after coming into possession as general manager. But this applies only to the First Division company's property. As to the other property, the extension line, Mr. Farley had been in possession as receiver from the fall of 1873 to the spring of 1876, and Mr. Kittson and Mr. Hill, and all concerned, knew that he was perfectly familiar with those lines and all things concerning them.

It appears from Mr. Farley's evidence that he knew but little about the First Division company's *bonds* until he became

general manager and became familiar with the liabilities of the company, as well as its assets.

Mr. Farley was being asked by counsel as to Mr. Hill's local freight agency for the First Division company (140–1, C. Q. 114–125), and as to his personal relations with Mr. Becker, who was president of the company before Mr. Farley became general manager (C. Q. 126–129). Then follows the cross-question 130, and the answer thereto, upon which counsel based his point in the court below, and which are as follows:

"C. Q. 130. Mr. Farley, now, at the time you took possession, as before stated, of the First Division line, what did you know about the management and business of those lines?

A. I knew a very little, sir; only from common report, and from what little I saw in passing over the road occasionally; had occasion frequently to go to St. Cloud on the road, or Melrose, looking after the interest of that thirty miles.

C. Q. 131. The line that you were operating down to that time in the Red river valley didn't make any connection with the First Division lines, or have any change of traffic with them by it?

A. Not to my recollection. I don't know how it could very well. The lines were so far apart—no connecting point. (142.)

We think it will be seen that the answer by Mr. Farley upon which counsel based his statement below—"Nor had he any special information as to the property, business or earnings of the First Division company. He admits this in his testimony"—does not bear out the statement, and that it is not just to Mr. Farley. Also that Mr. Farley was confining his answer to the question, which was as to what he knew of the "*management and business of those lines*," and not as to the property as a railroad, its needs or its capabilities, or its value, or as to the relative value of its different parts.

There is no evidence in the record that Mr. Farley was ignorant of the First Division company's property as a property,

nor that his judgment as a railroad man concerning it, was not made up to a large extent before he became general manager. In Mr. Carp's printed report to the committee in 1873 (466), it is said:

"Inasmuch as the management of the First division St. Paul and Pacific refused to give the desired information to our agents, we had to be satisfied with inspecting the roads and to inquire from various people into the traffic, land grant and future of the road, for which purpose I traveled over the road in company of Mr. Morris and Farley."

And this is followed by Mr. Carp's discussions of the branch line (476-7)—and on page 477 he says:

"Generally the branch line is considered at St. Paul as a valuable property and the many efforts which Mr. Delano has made to get control of this part may be sufficient proof that he, who can best judge of this line as ex-superintendent, also shares this opinion."

On the next page (478) he says:

"Mr. Farley estimates that this line can be operated for sixty-five to seventy per cent. of the gross receipts."

And again in the report (480) it is said:

"The first half Main Line runs, besides through the Big Woods, through a very fertile and well situated agricultural region. The towns of Litchfield and Willmar have, considering the short time of their existence, already got to be of considerable significance, with a lively trade and an important export of grain. From St. Anthony to Willmar the line is already considered to pay well; the remaining portion not yet. Nevertheless, Mr. Farley, who has had charge of the management of railroads for eighteen years, stated to me that in his opinion the main line well managed would already be capable of earning $1,000 (one thousand dollars) per mile over its entire length, with an annual increase of fifteen to twenty per cent.

The road and the rolling stock are in good condition, and there being no artificial works or bridges and the road running for the most part over the prairie, the cost for maintenance can be small, why Mr. Farley thinks that now already twenty-five to thirty per cent. might be applied for the benefit of the bondholders. (478.)

Mr. Farley's attention having been directed to the property as in the quotations given from Mr. Carp's first report, as early as 1873, it is quite probable he continued his interest in and study of the subject, so that he had information, knowledge and views which would make his opinions valuable, and that those views and opinions would be so considered when he met with Mr. Kittson immediately after becoming general manager, and had the main interview over which there is so much dispute. The testimony by Mr. Farley which counsel relied upon below, and which is noted above, is the only testimony by Mr. Farley which bears on the question of his knowledge of the First Division property as a property, and as distinguished from the *bonded debt* and *management* of the property before he became the general manager of it.

The proof shows that the main interview occurred very soon after Mr. Farley became general manager, but that the preliminary interviews, or at least some of them leading up to the main interview, occurred before the taking possession as general manager.

While the testimony is not clear as to the dates—that is as to fixing any particular days or months in which the preliminary interviews or main interview occurred—yet it is clear according to the best of Mr. Farley's and Mr. Fisher's memories, after they had been shown the letter which Mr. Farley wrote to Mr. Barnes on June 3, 1876 (which was not copied on the letter-book), that the main interview occurred before that letter was written. That letter on the face of it furnishes perfectly reliable proof in writing, that Mr. Kittson had entered into the negotiation, and that Mr. Farley was assisting him in it. Both witnesses testified that the preliminary interviews began a considerable time before the main interview was reached. While those preliminary interviews were going on Mr. Hill had ample time to visit Ottawa, as he testified he did, and he and Mr. Kittson ample time in which to become assured

that Mr. Smith would be able to raise the money, so that Mr. Kittson could so assure Mr. Farley, as Mr. Farley says he did at the interview.

On Mr. Hill's return from Ottawa Mr. Farley was in the possession of the First Division property, because Mr. Hill says he returned the last of March, and Mr. Farley took possession about the middle of March.

Mr. Barnes was in St. Paul for some time after Mr. Hill's return, because they came on the same train together from Chicago, as Mr. Hill and Mr. Newell recollect. Following the return of Mr. Hill, the main interview with Mr. Farley occurred, and following that, the talks with Mr. Barnes, in which Mr. Barnes would give no satisfaction to the parties—would not entertain it, "hooted at it," as Mr. Farley said, and put them off, as Mr. Hill says.

If this view be correct—and there is plenty of room for every event to occur before Mr. Barnes left to return to New York about the middle of April—the whole matter is plain, and the letter brought in with the design to confuse Mr. Farley, and which did confuse him very much (1365 and 1369), until he was allowed to see it the next day, and read it over in the light of letters written to him by Mr. Barnes (till then very blind and obscure)—becomes most valuable evidence for the complainant, and, as we view the matter, helps his case far more than the error of his memory as to a date could or should prejudice it.

Until that letter of June 3, 1876, was produced by the defendants, Mr. Fisher and Mr. Farley had nothing with which to refresh their memories of the dates, and had to rely upon their unaided memories to carry them back over a long period of time, and through a long period during which, as they testified, interviews were being had with Mr. Kittson and Mr. Hill very frequently, and between Mr. Hill and Mr. Farley almost daily, when they were both in the city.

In closing our discussion of this point, we call attention to the testimony of Mr. Farley and Mr. Fisher (when first called as witnesses for complainant) on the matter of the date of the interviews with Mr. Kittson and Mr. Hill.

(1.) Mr. Farley testified as to the dates, not positively, but only as to the best of his recollection of the period in which the conversations occurred. He said:

"These conversations, to the best of my recollection, commenced in the month of August, 1876, and continued into the month of September of the same year, 1876." (79.)

Mr. Farley was neither cross-examined as to these conversations, nor as to the dates when they occurred. Not one word of cross-examination took place upon what counsel in the court below argued was a long and circumstantial statement fabricated from beginning to end.

It is to be remembered that the conversations on this subject between Mr. Farley and Mr. Hill, particularly, were very frequent and ran through several years. Mr. Farley says:

"The conversation on this subject of this enterprise of ours continued during that year (1876) and the following year (1877) and until it was consummated." (79.)

As to the remark by Mr. Kittson to Mr. Farley, in the main interview (as testified to by the latter), that Mr. Farley was "General Manager, *under the trustees* in possession," etc., etc., which was not correct, *at that time* Mr. Farley was examined upon the point *while defendant's witness*, and said:

Q. 66. If that date was previous to the 3d day of June, 1876, how could Mr. Kittson have reminded you that you were general manager for the trustees in possession, and that the company was litigating to get possession of the road, when the trustees did not take possession until the 9th and 10th of October, 1876, as you have yourself testified?

A. It would be a very easy matter for me to make a

mistake, because I occupied the same position under the management then and also under the trustees, and that trustees word "in possession" got to be so pat—so commonly used—that I might have mentioned it without proper reflection; I occupied the same position under both administrations. (1365-6.)

(2.) Mr. Fisher, who talked with Mr. Hill about the matter some considerable time before Mr. Kittson and Mr. Farley were brought together, *testified as positively as he did to anything else*, that the first conversation with Mr. Hill was in regard to the extension lines and extension line bonds only. (342.)

On cross-examination he stated, when his attention was particularly called to the matter, that in this first talk they merely talked of the extension lines. (373.) And again, being further cross-examined on this same point, he said:

"My recollection is that the two interviews that I had with Mr. Kittson and Mr. Hill at Mr. Hill's request, was almost exclusively of the St. Paul and Pacific,—of the Extension Lines." (377.)

And again, while testifying as to what was said between him and Mr. Kittson when he called at Mr. Kittson's office, as requested by Mr. Kittson, he said Mr. Kittson then, for the first time, asked him about the First Division. (379.)

We submit that this is important testimony by Mr. Fisher, given almost a year before counsel for the defendants produced Mr. Farley's two uncopied letters of June 3d and August 23d, and that it points with almost a certainty to the conclusion that at least some of the various preliminary interviews by Mr. Fisher with Mr. Hill and Mr. Kittson, were had before Mr. Farley came into possession as general manager of the First Division property,—and hence the greatest abundance of time elapsed for all those things to occur as testified.

If this testimony were not the best effort of Mr. Fisher's

memory (but an effort of imagination or invention), he would naturally have said the interviews in the first instance related to the entire property of both companies, instead of being confined to the extension lines. It becomes stronger than ordinary evidence. It amounts to almost a demonstration that the conversations between Mr. Fisher, Mr. Hill and Mr. Kittson were before the other lines came fully to the knowledge of Mr. Fisher through Mr. Farley's coming into their possession as general manager. In this point of view again, Mr. Fisher's rigid adherence to his impressions and memory of what was said, becomes valuable to the cause of truth, when it is seen that his testimony agrees with the written evidence afterwards produced. Prior conversations after so long a time, may easily become mingled or telescoped, as it were, in the recollection, with others relatively *of almost the same date*,—and if they appear to be so, and no motive for the misstatement exists, the testimony is not, because of such mere error of memory to be set aside as fabricated.

Again, in Mr. Fisher's testimony, on cross-examination, when questioned about the dates of these various conversations, while he had, as he says, recollections as to the state of the weather (a very treacherous thing to trust to after the lapse of many seasons), and gave as his best memory that the main conversation occurred in the month of August, 1876, still, when pressed on the point, *he repeatedly testified that he could not fix the date*, that it might have been August, it might have been July, *it might have been earlier*. And that the only date as to which he was positive was, that the main conversation occurred *before* October 9, 1876, when the trustees took possession of the First Division lines. (389.)

And we submit that the only material question is, *did the interviews take place?* Hence, this whole matter stands upon the footing of an honest mistake in the memory of an immaterial date, followed by an honest correction of the error, upon

being shown better evidence than the unaided memory as to the true date, to wit: documentary evidence, not in the possession of the witnesses when they first testified.

As to the remark by Mr. Kittson, testified to by Mr. Fisher, that "Mr. Farley has made a great change in that property since he has managed it, and we have great confidence in him," Mr. Fisher does not say that the remark was made with reference to the First Division Company, and it is obvious that the remark by Mr. Kittson would apply to the extension lines as well as to the former lines. In the extension lines, Mr. Kittson was more directly interested, because his line of steamboats had, from 1874, been running in connection with the extension lines managed by Mr. Farley as receiver. When Mr. Farley took possession of those lines they were in an unfinished condition, and no trains were being run or business done over them. Mr. Farley had already graded up and put in order those lines, so that they could be operated, and had hired cars and locomotives from the Northern Pacific Company, and in September, 1875, some six months before, had built the Spur Track. It may well have been that Mr. Kittson would make the remark to Mr. Fisher and Mr. Farley above stated, either a short time after or at any time before Mr. Farley became General Manager of the First Division Company.

We will now examine the next point of criticism, viz:

3. The claim that the error made by Mr. Fisher and Mr. Farley in stating the date when the main interview in question occurred, was not a mere error of recollection, but an intentional placing of that interview in August or September, instead of March or April, 1876,—and that it was done on account of the situation of affairs generally, and the pendency of the Litchfield agreement in particular.

The above charge or what we understand to be the substance of it, as made in the court below, was based upon

the assumption of various matters of fact, embracing the ones we have just discussed under the preceding point, (relating to the position Mr. Farley was in with reference to information, etc., in the spring of 1876)—and upon the fact that the Litchfield agreement being in force at the time of the interviews under discussion, those interviews are thereby rendered improbable. We have already discussed, as far as we care to, the subject of the position of Mr. Farley as to information, etc. But we will consider the matter of the Litchfield agreement as a supposed obstacle known to exist, and in view of which counsel argued Mr. Farley and Mr. Fisher in the first instance *intentionally* placed the date of the interviews in August or September, instead of March or April, 1876. In other words, the charge in substance is, that, as the Litchfield agreement (1508), which was pending until the middle of August, 1876, and was a very long, complicated and involved compromise arrangement, between the bondholders and the stockholders, for scaling down the interests of each on certain terms, etc.,—making, as it were, an amicable settlement while it lasted,—Mr. Farley would not have entered into, and especially would not in making up a fabricated story, after the events, claim to have entered into a scheme to buy the bonds while that agreement was in vogue.

We will dismiss this point with the remarks:

(1.) That as a matter of fact Mr. Hill, Mr. Kittson, and Mr. Farley did address Mr. Barnes on this very subject within the spring of 1876. Mr. Barnes wrote to Mr. Farley on June, 19, 1876:

"I have much to say to you regarding matters *that we have talked of* with our St. Paul friends, Mr. Kittson and Mr. Hill, but shall defer it until I see you."

And Mr. Farley had written Mr. Barnes on June 3, 1876, after those interviews had been held in St. Paul, of course, in March or April of that year, to which Mr. Barnes referred:

"N. W. Kittson is getting anxious about the big operation of getting control of First division, also extension lines. He can get the money. What do you think can be done? You have his proposition in your memory."

(2.) The argument that a person would not do or claim to have done a particular thing at a particular time, on account of the improbability of its being then undertaken, or on account of a supposed obstacle then known to exist, would seem to be effectually met and disposed of by absolute proof that, as a matter of fact, the particular thing was undertaken at the particular time. If it is shown that several parties, all being aware of the supposed obstacle, *acted, notwithstanding the obstacle*, it would seem that the argument based on the supposed *improbability* of such a thing being done at such a time and under such circumstances, must fall to the ground.

(3.) The argument that Mr. Farley falsely and intentionally, in the first instance, fixed the making of his agreement with Kittson and Hill as having taken place in August or September, 1876, because he, and, as is intimated, those counseling him as his solicitors, would deem that to be a more plausible statement than to fix the time in the spring of 1876—the Litchfield agreement being in force at that time, but not at the later period—seems effectually disposed of by pointing out that not only the complainant, Mr. Farley, but also the defendants, Mr. Kittson and Mr. Hill, regarded the spring of 1876 as a proper time to act in the matter, and that they did all so act, notwithstanding the Litchfield agreement as a supposed obstacle deterring such action.

The next ground of objection in the court below, urged by defendant's counsel, was:

4. The claim that the testimony by Mr. Fisher and Mr. Farley that Mr. Hill once wished or suggested to send a man to Holland to buy the bonds, but concluded to await Mr. Carp's visit, is a fabrication, and proven to be so, because of the date

when Mr. Carp came out, and because of the time when it was first known he was coming.

The only testimony of Mr. Farley and Mr. Fisher on which counsel sought to maintain the position substantially above stated, is as follows:

Mr. Farley, when testifying in his own behalf, said, while stating his interviews with Kittson and Hill in 1876:

"After this interview, Mr. Hill saw me daily almost, and had a great deal to say about the future of this enterprise, and a general running talk between him and I lasted for some—possible weeks. I didn't see Mr. Kittson as often as I saw Mr. Hill, and there was not as much said between him and I as there was between Mr. Hill and I. Mr. Hill came into my office, *on one of his daily visits*, and said to me that he had been looking round with a view of getting a man to go to Holland—Amsterdam—to stay there and purchase these bonds upon the market as they might be offered. I said to Mr. Hill that that would be very imprudent. I think at this time Mr. Hill was aware, too, that the most of these bonds were held by a Dutch committee," etc. * * * "A Mr. John Carp, who had been in America in 1873, soon after my appointment, was expected to arrive in St. Paul very soon, and through him I could ascertain the probabilities of buying this holding of the Dutch committee. Mr. Hill agreed with me that that was best—to wait till Mr. Carp arrived. Some weeks later than this, Mr. Carp did arrive. Mr. Carp spent a great deal of his time with me.," etc. (74-5.)

On this Mr. Farley was not cross-examined.

When testifying for the defendants, Mr. Farley said, in substance, what is shown by the replies to questions 326–7–8 (1,424–5), viz:

Q. 326. How long was it after the meeting at which the combination between yourself, Mr. Hill and Mr. Kittson, as stated in your testimony last Autumn, was formed, that Mr. Hill proposed to you that a man should be sent to Holland to buy bonds, or stated to you that he was about sending a man to Holland to buy bonds?

I never testified that Mr. Hill was about sending a man, but such testimony,—He had been thinking about finding a man; had been exercised over the matter considerable; but I do not think that Mr. Hill had made up his mind at that time as to any particular man being competent; and as to the time, as my recollection serves me now, it would not be a great while after the syndicate was formed that has been referred to; that is my recollection now.

Q. 327. You say "not a great while;" about what period of time do you mean by that expression?

A. The incident as it occurred in my memory is very clear, but as to the particular time it occurred, Mr. Hill was talking about this thing constantly,—I couldn't give any date when this talk took place between Mr. Hill and myself. As I said before, I think it was not a great while after the syndicate was formed, but whether it was a week or a month I couldn't state.

Q. 328. Do you think it was a month?

A. I wouldn't be positive of that, even, sir,—even as to a month; but that conversation did take place. Mr. Hill was talking a great deal and seeing me very frequently on the subject of this matter in hand, but when this particular thing took place, I am not prepared to say. (1,424.)

And on cross-examination by his own counsel he testified:

C. Q. 2. Had you at the time of the last-mentioned conversation news that John Carp was to be expected out here?

A. Yes, sir, I think so; Mr. Knuppe, a brother-in-law of Mr. Carp's, was a clerk in my office, and had, as I understood him to say, much correspondence with his brother-in-law, Mr. Carp. I cannot now state how I learned that fact, but I recollect of saying to Mr. Hill that Mr. Carp was to be here, and those majority bonds that were being sold on the market at Amsterdam was not the bonds we wanted. We wanted a majority held by the committee, so that we could control the property at the foreclosure sales.

C. Q. 3. Do you mean to be understood that this particular conversation now being inquired of occurred before Mr. Carp came out in the latter part of the year 1876?

A. Yes, sir, before Mr. Carp arrived in America; in that year, I mean. (1,425-6.)

Mr. Fisher, on direct examination, was asked nothing as to this matter; but on cross-examination he testified as follows:

C. Q. 229. My question is whether it had occurred to you at or prior to the times mentioned in the last question that there was any other way to buy the bonds except on the market?

A. No, sir; I never thought of that until Mr. Farley suggested it. My recollection is that after this final interview, as we call it, Mr. Hill came into Mr. Farley's office, that Mr. Farley and I sat there, and I think he had just returned from a trip East, and Mr. Farley thought the best way would be to wait until Mr. Carp came over; and Mr. Hill agreed with him.

C. Q. 230. Did Mr. Farley at that time say anything about the Dutch committee of bonds?

A. The bonds that were in the hands of the Dutch committee. My recollection is that Mr. Farley said, "The thing to do is to buy the bonds in the hands of the committee first," and he had advices then that Mr. Carp was coming.

C. Q. 231. And did Mr. Farley explain to Mr. Hill what the Dutch committee was?

A. I don't remember whether he did or not.

C. Q. 232. You don't remember whether in that talk it was taken for granted that Mr. Hill knew about the Dutch committee and its holding of bonds, or whether Mr. Farley explained to him that there was such a thing as a Dutch committee, and that the Dutch committee was the holder of these bonds?

A. I do not remember any explanation of that kind. (382.)

In this testimony we fail to discover any intention to fix the time when Mr. Hill made the suggestion in question, or when the knowledge was had that Mr. Carp was expected to be in St. Paul. Counsel construed the expressions of Mr. Farley first above quoted, to have the effect that Mr. Farley meant to say that his conversation with Mr. Hill as to sending a man to Holland occurred—and that from Mr. Farley's language, of necessity it must have occurred—before Mr. Farley could have had, through Mr. Knuppe or through Kennedy & Co., information that Mr. Carp might be expected. But in neither Mr. Farley's nor Mr. Fisher's testimony are we able to see any attempt to fix or define the time when Mr. Hill made his suggestion, or when Mr. Carp

was known to be coming. Hence we think the criticism far-fetched and inconclusive. Mr. Farley clearly meant to say simply, what he did say, that "Mr. Hill came into my office on one of his daily visits," etc., and not to say it was at once after the main interview, nor that it was within "some—possible weeks"—as counsel evidently construes the entire statement on page 74 of the record, to mean. But the subsequent testimony above given, obtained from Mr. Farley by the defendants while he was their witness, must in any event put the matter to rest. (Q. 328.)

The next criticism by counsel below was:

5. The claim that Mr. Kittson and Mr. Hill could not have had the interview with Mr. Fisher, as testified to by him, in which Mr. Kittson and Mr. Hill insisted upon a telegram being answered in Mr. Farley's name—Mr. Kittson, at the same time, referring to Mr. Farley's interest with himself and Mr. Hill as a reason for so doing.

To sustain this point, counsel made a close examination of the record for evidence as to when Mr. Kittson was in St. Paul during the summer of 1877, with a view to demonstrate that he could not have been there during the time when a cipher dispatch *could have arrived*, calling for an answer, and upon which the incident with Mr. Kittson *could have occurred* as Mr. Fisher stated (348). And counsel reached the conclusion that no such message as Mr. Fisher speaks of could have arrived until after September 28th, Mr. Kittson having left St. Paul some time in July, 1877, and remained away until September 1st, and having gone away again on September 6th. Counsel said in his brief below:

"Between September 1st and 6th the only subject of any message would be whether the associates would meet Messrs. Kennedy & Co. in New York and Montreal." (Bottom of page 257 of of the brief.)

But the fatal flaws to this position are:

(1.) The cipher code was sent from New York May 28, 1877 (285, Comp. Ex., 126); Mr. Kittson was in St. Paul some time during July, and the message may then have been received and required answer. There is no proof that the particular message was preserved so that it could be introduced in evidence.

(2.) Mr. Kittson was in St. Paul, as counsel admitted from September 1st to September 6th, and there was a message received on the 3d or 4th of September containing a very IMPORTANT INQUIRY as to Kittson and Hill, and requiring a very important answer to be sent immediately. That telegram in cipher is in evidence, and is as follows: (325 C., Ex. 182.)

Dated NEW YORK, 4, 1877.

Received at St P., Sept. 3.

To J. Farley, St. P. & P. R. R. Co.:

"Can we issue the maxim marriage shares to Knuppe transfer to Vocalist and ship certificates to Vocalist Wednesday Steamer tell Vigor we desire to meet Village and Villain and communicate result of meeting to Vocalist before tenth if possible to arrange meeting this week ask Vigor to extend time for consideration proposition for term requested by Visitor or until meeting can be held alack.

64 pd 260 via Chic.

J. S. KENNEDY & Co."

The translation of that message (which was pinned thereto, as shown on page 353), follows in the record, and is as follows, (325 C., Ex. 183):

Can we issue the twenty-five hundred shares to Knuppe, transfer to committee of bondholders, and ship certificates to committee of bondholders, Wednesday steamer? Tell N. W. Kittson and J. J. Hill we desire to meet Geo. Stephens, president Bank of Montreal, and Donald A. Smith, and communicate result of meeting to committee of bondholders before tenth; if impossible to arrange meeting ask N. W. Kittson and J. J. Hill to extend time for consideration proposition for term re-

quested by John Carp, or until meeting can be held; reply by cable.

J. S. KENNEDY & Co.

It is admitted Mr. Kittson was in St. Paul from September 1st to 6th; and the last clause of the message shows counsel in error in saying (his brief page 257), "between September 1st and 6th the only subject of any message would be whether the associates would meet Messrs Kennedy & Co. in New York and Montreal."

The request was to know whether the time for consideration of the proposition which had been sent to Mr. Carp *would be extended by Kittson and Hill* until a meeting could be held in New York.

The proposition of May 26 had been extended to September 10, by letter written July 31 (534–5); and the request for extension of time in the above message required immediate answer—as Mr. Fisher testified some message did.

Instead of Mr. Fisher's "fine story," counsel's theory held in the court below "must fall to the ground for want of a peg to hang it on."

The next point urged was;

6. The claim that because Mr. Farley bought jointly with a friend in Dubuque, through John Carp, some bonds held in Holland, and afterwards sold them—that this shows that he was not interested with Kittson and Hill.

Counsel called attention to the fact that Mr. Farley bought some bonds in Holland, and argued from that fact that his conduct in so doing shows he had no agreement or joint understanding with Kittson and Hill. But counsel omitted to state the circumstances and conditions under which those bonds were purchased and which explain the transaction and show it to have been in no sense hostile to, or conflicting with the enterprise or propo-

sition which Kittson and Hill submitted to the committee. Mr. Farley's purchase of bonds was authorized before the associates made any offer to buy the bonds, though it was made while a proposition was pending to buy the railroad itself.

The bonds Mr. Farley bought jointly with Maj. Day, to the amount in value of about $20,000, were all bought upon an arrangement made with Mr. Carp when he was in St. Paul in the winter of 1877, and before his departure, which was in February, 1877. At the time Mr. Carp was in St. Paul the negotiation was opened with him by Mr. Farley, who introduced Kittson and Hill, and while Mr. Carp was absent on a visit to New York (after he had first been in St. Paul), the first proposition in writing was sent to him at New York, and that proposition was a proposition by Kittson and Hill, *not to buy any bonds whatever*, but to buy the entire First Division Company's railroad, etc., for three and one-half million dollars in cash, payable after a foreclosure should have been made, not by Kittson and Hill, but by the committee itself, a title to the railroad property clear of all incumbrance to be made and given to the purchasers by the committee, and leaving to the committee as its property, to go to the bondholders, all the unsold lands and unpaid deferred payments on the lands, estimated to be worth over $7,000,000. (529.) The purchase of bonds which Mr. Farley and Major Day authorized Mr. Carp to make for them, was so authorized and arranged to be made while the first proposition just stated was pending, and before Kittson and Hill made the offer of May 26, 1877 (in lieu of the former), to buy the bonds of both lines at prices which were named in such subsequent offer. (533.)

Mr. Farley testified:

* * * All my transactions was done through Mr. John Carp, of Holland, in the purchase of any of these securities. (169, C. Q. 289.)

A. My recollection is that Major Day, of the Standard Lumber Company, left with me $10,000, and I possibly added to that an equal amount of my own money. These purchases were made through Mr. Carp, in Holland.

C. Q. 301. And what amount—nominal amount— of bonds were embraced in that purchase?

A. Well, as my recollection serves me, they were bought on the market there at prices at which bonds were then going.

C. Q. 302. When was this purchase that you made in connection with Major Day?

A. It was in 1877, after Mr. Carp had been to America.

C. Q. 303. What time in 1877, as nearly as you can state?

A. I couldn't state, sir, but it was after Mr. Carp's visit to America, because we talked the matter all over when he was here—made the arrangement to purchase them through him. (170.)

The first proposition which was not a proposition to buy the bonds, but to buy *the property* (after a foreclosure and good title should be made), to which we have referred, is on page 529, and the subsequent proposition which was to buy *the bonds* for prices therein stated, is on page 533, of the record.

This being the case, as we have pointed out, we are unable to see wherein the purchase which Mr. Farley made of outstanding bonds on the property could in any sense be a transaction which affected the matter as between Mr. Farley and Kittson and Hill. When he so bought Kittson and Hill were not buying bonds for the associates. If anything, it might be strongly argued that Mr. Farley's buying bonds which were a lien on the railroad property would have a tendency to support the proposition. As the bondholders would, on the carrying out of the Kittson and Hill purchase (after foreclosure), receive a dividend on their bonds from the purchase price, and would, in addition thereto, receive the proceeds of the lands, this purchase by Mr. Farley and Maj. Day would indicate that they considered the proposition (if accepted) would increase the selling value of the bonds, and, if anything, would influence the acceptance of the proposition.

The next point to be answered is:

7. The claim that Mr. Farley's statement that he made an error in fixing the date when the premature newspaper publication was made, of which Mr. Kittson complained, is not warranted by the facts, and that it was not an error, but a pure fabrication of the entire alleged incident.

Counsel in his brief below made a very earnest effort to show that the matter of the newspaper publication which Mr. Farley related in his testimony (and of which Mr. Fisher remembered Mr. Kittson complained to Mr. Farley), was "on its face an invention, and a malicious one." Counsel went on to show that the publication *which was made in February, 1878*, was, as a matter of fact, procured by Mr. Hill; and that it was advisable and wise for Mr. Hill to cause the publication at that time, in view of certain exigencies in the legislature; and to refute certain charges, being made to the effect that Kittson and Hill were not, in fact, the purchasers of the bonds, as Mr. Hill was representing, but that they were acting for the Dutch committee, and were seeking the legislation on a false pretense of having bought the bonds. It seems rather strange that Mr. Hill's representations around St. Paul should have been so much doubted and discredited! However, Mr. Hill had the publication made which stated to the effect that Kittson and Hill *were the purchasers, etc., etc.* Counsel made out this much of his point, but he failed entirely to show that there was any reason or cause justifying the publication in the same newspaper of substantially the same things, *on October 26, 1877*, immediately following the time, or just at the time when the Dutch committee had signified their acceptance of the proposition which Mr. Stephen was then in Europe to carry out, and which acceptance and attempt to purchase proved a *fiasco*. That publication of October 26, 1877, was premature, without excuse and foolish, and it turned out to be so in view of the *fiasco*. Yet

counsel said in his brief below (p. 279): "And for anything that appears the October article was in no way objectionable." But it was objectionable in that it was premature as the sequel showed—there was a hitch in the negotiation—it was not closed—Mr. Stephens was at odds with the committee—his finances had not been arranged—he utterly failed. True, the committee considered it a sale, but Mr. Stephen did not. Mr. Stephen says: "After considerable negotiation I utterly failed," etc. (1,237, Q. 77-8.) But it is useless to speculate upon what might have been the untoward consequences of that premature publication. Counsel failed to make out a good case in its favor, though he did apparently make out a good case in favor of the advisability of making the publication *in February, 1878*, that without it Mr. Hill's private statements were not considered worthy of credence around St. Paul.

A lie consists in an intent to tell an untruth. It is true that Mr. Farley in his deposition following a question which, strictly speaking, was somewhat leading in its character (102, Q. 256), inasmuch as a clause from a letter mentioning newspaper articles was read to him by the counsel examining him, and he was asked (without objection) "if, at about the date of that letter, you had any conversation with Mr. Kittson, with reference to the then pending negotiation referred to in that letter?" To that he answered: "I had." He was then asked: "State what Mr. Kittson said to you at such conversation?" and then went on to state the interview with Mr. Kittson. But the entire context of that testimony shows that Mr. Farley did not remember *the date of the publication*, but that it was as he stated in answer to question 259 (bottom of page 103):

Q. 259. How soon after your conversation with Mr. Kittson with reference to the newspaper article mentioned, did the negotiation or business pertaining to the purchase of the said bonds end?

A. This newspaper article was on what date? I know the

negotiation was considered almost closed, and the contract as signed by them will tell the tale precisely. (103.)

There was no cross-examination of Mr. Farley as to the date in question, nor as to the interview with Mr. Kittson which counsel afterwards claimed was simply fabricated from beginning to end, and a malicious invention.

Neither of the newspaper articles were produced before the examiner until it came to the defendant's testimony. On cross-examination of Mr. Farley by his counsel, after defendant's counsel had tried to show that Mr. Farley had had no interviews or consultations with Mr. Kittson or Mr. Hill, which would support his claim to have rendered services, etc. etc. (1,416, Q. 290 to 304), there was produced the newspaper article on October 26, 1877, in the "Pioneer Press," which was read to Mr. Farley, and he was asked a question (1,433-6), which is as follows:

"And I ask you if the premature publication which you mentioned in your direct examination last autumn may or may not have been that publication just shown and read to you?

A. Well, sir, I am very thoroughly convinced now, after hearing that communication read, that that is the one that I had reference to; Mr. Kittson's coming into my office and asking if I had seen what was in the paper about this negotiation, and seemed to be very much excited over it, and laid all the blame, as he called it, to Jim Hill; just what he had been looking for ever since the negotiation commenced; that the fellow couldn't keep from talking. My impression is now that that is the article. What I might have testified to on former occasions I do not recollect. I do not recollect of but one item, but I may have been mistaken, and the fact of Mr. Kittson's coming into my office—there is no mistake about that—and making the suggestion that he did about Mr. Hill's giving the thing away. (1,436.)

On re-direct examination counsel for defendants produced the article of February 13, 1878 (1,462). Mr. Farley was examined at length as to both publications and his knowledge or

recollection of them. (1,455 to 1,465.) The examination closed with the statement by Mr. Farley:

"I never had much to do with newspaper articles, and certainly it was not inspired by myself. I never had time." (1,465, R. D. Q. 93.)

But the gist of all that counsel sought in his long examination (as we understand it), was admitted by Mr. Farley as follows:

"R. D. Q. 67. Was the fact that there was testimony in this case that Mr. Kittson was absent from St. Paul during the month of February and down to the 15th of March, 1878, one of the circumstances which became present to your mind, and led you to think that you might have made a mistake?

A. I have no recollection of thinking about the subject at all until it was called to my recollection within a few days; no doubt my attorneys saw the mistake and called my attention to it, and these gentlemen, having so much confidence in my desire to tell the truth, they put themselves to the trouble of finding out how this thing had happened. I can account for it in no other way.

R. D. Q. 68. My question is whether the fact of Mr. Kitson's absence from St. Paul during the month of February and down to the 15th of March, 1878, was a circumstance which came to your notice and contributed to your thinking that you might have made a mistake when you gave your testimony last Autumn.

(Objected to because the witness has already answered the same question in substance.)

A. I have but little doubt in my mind that that was the fact. The attorneys looking over the testimony that had been taken was a good deal more likely to discover this error and mistake of dates than I would be, and I have no doubt that had its influence on my attorneys in calling my attention to this error. I think it was, possibly. (1457.)

We can only say in conclusion of this matter, that which is a mere elaboration of what Mr. Farley himself said, as just quoted. When it was shown that Mr. Kittson was absent from St. Paul about February 13, 1878, in New Orleans, in fact, and his counsel who took the deposition looked over Mr.

Farley's deposition, wherein he had apparently testified that the article of February 13, 1878 was the one of which Mr. Kittson complained, the matter was looked into more closely; and it was found that there had been another and prior premature publication of almost identical character with the one of February 13; and which, when found, bore date October 26, 1877—at the very time when Mr. Stephen was abroad, and the negotiation was supposed to have been completed and the bonds bought, as was also supposed in February, 1878.

We submit, in conclusion of this part of our brief, that, if Mr. Farley had not been telling substantially the truth in his testimony (however indefinite as to date), *from the nature of things* there would have been no prior, premature and inexcusable article in existence to exactly fit the case, and no searching would have found it. We believe even counsel for defendants will appreciate the force of this. To him who *seeks to tell the truth* his very errors of statement raise up inanimate witnesses which speak to defend him, with voices convincing beyond the power of human tongues.

It may not be out of place at this point to again call the court's attention to the decidedly fruitless and utterly unfounded attempt of defendants' counsel to raise a suspicion that Mr. Fisher, the President of the St. Paul and Duluth Railroad Company, who was Mr. Farley's assistant in 1876, and who testified in this case to conversations by Mr. Kittson and Mr. Hill with Mr. Farley—as disinterestedly as any witness ever could ~~to~~ testify—had some secret interest in Mr. Farley's claim against the defendants—whereby the great weight to which Mr. Fisher's testimony is entitled, as a disinterested witness, should be diminished or rendered less availing to the complainant, in the scale against Mr. Hill.

In stating Mr. Fisher's testimony, in which he denied that there was any such ~~intent~~ interest on his part, we have, perhaps, done all that is required on this point. (*Supra*, p. 86.)

DEFENDANTS' CASE AND PROOFS.

I.—INTRODUCTION.

In this case the defense made, so far as the facts are concerned, is based upon the testimony of Mr. James J. Hill, one of the defendants, supplemented by the testimony of certain witnesses, none of whom claim to have had any direct dealings with the complainant, or conversations with him, with reference to the contract matters upon which he, as the complainant, brought this suit against Mr. Hill, Mr. Kittson and the defendant railway company.

All the documentary evidence introduced by the defendants is in the nature of a corroboration or attempt to corroborate Mr. Hill's testimony. There is no testimony in the record by any witness aside from Mr. Hill, as to conversations with Mr. Farley, in contradiction to the testimony given by Mr. Farley, except it be claimed that the testimony of Mr. John S. Kennedy, whose deposition was taken upon written direct interrogatories, oral cross-examination and re-direct examination, at the capital of Switzerland, under the commission ordered by the court, may in some parts be considered as a direct contradiction of Mr. Farley.

The testimony and proofs for the defense are therefore naturally divided into (1) Mr. Hill's evidence, (2) corroboration of Mr. Hill's evidence—which includes Mr. Kennedy's testimony and documentary evidence.

The testimony Mr. Hill gave, covers the entire ground of the defense, and relates to every subject-matter upon which the defendants rely.

The issue upon the facts is as to whether the contract with the late Mr. Kittson and Mr. Hill, was made and entered into, substantially as set up in the bill, and substantially as sworn to

by the complainant Mr. Farley, and the witness Mr. William H. Fisher.

The complainant's case upon his proofs has been stated.

The claim is made that a contract was entered into in the spring of 1876, by which Mr. Kittson, Mr. Hill and Mr. Farley joined, upon equal terms of interest as between them, in the venture to buy the bonds of the two railroad companies, the lines of which have been since foreclosed and which are now operated by the defendant corporation, The St. Paul, Minneapolis and Manitoba Railway Company.

The defense is, broadly stated, a denial that any such bargain or joint agreement was entered into.

In making out this defense upon the facts, the defendants rely (1) Upon the positive denial by Mr. Hill that he was ever present at any interview or interviews with the complainant, wherein such bargain and joint agreement was made, as complainant alleges in his bill and has testified to under oath; and to sustain such denial,

(2) The defendants set up certain alleged facts, circumstances and occurrences which it is alleged took place or existed prior to the time when the complainant alleges the agreement was entered into with him; and also other facts, circumstances and occurrences after the agreement is alleged to have been made with the complainant.

As to the positive denial which Mr. Hill has sworn to, that he was present at the interviews at which, and in which Mr. Farley and Mr. Fisher swore he was present and took part, we shall only say that those denials speak for themselves;—they are broad and sweeping,—each answer bearing on the conversations in his presence, given by Mr. Farley or Mr. Fisher, was either read or stated in his presence, and Mr. Hill unequivocally denied the truth of such answers. (681,697.)

He also denied that he ever at any time entered into any

bargain, agreement or joint undertaking with Mr. Farley in the premises.

It remains necessary, therefore, to consider only the second branch of the defense on the facts, viz.: The alleged facts and circumstances before and after the spring of 1876, tending, as it is alleged, to show that no such agreement was in fact entered into.

The case of the defendants, as referred to and urged in the brief of counsel in the court below, is that Mr. Hill and Mr. Kittson were already embarked in the enterprise for acquiring the bonds or property, several years before the spring of 1876, when Mr. Farley says he became an associate with them. It was with Mr. Donald A. Smith they were so engaged, as it is alleged, and Mr. Smith was the originator and parent of the entire transaction, admitting Kittson and Hill to a scheme with him, which he had formed; and that they were not the promoters of the scheme and did not originate it. On this theory proof was taken, and the case was argued by defendants' counsel in the court below.

Our position on this branch of the case is that there was no scheme to acquire the property until the spring of 1876, and that the whole fabric set up to sustain the Prior Scheme, is but a creation of the imagination, a vast structure, as it were, spanning the sky—beginning nowhere and ending nowhere, with airy pillars and domes of glass unable to sustain their own weight—and, being without foundation, it crumbles to the ground, and leaves the defendants as their only refuge, the bald denials by Mr. Hill that he agreed with Mr. Farley to go into the enterprise, as is testified to by two witnesses.

And our position further is that having set up such a theory and attempted to prove such a Prior Scheme, they adopted a line of action which cut them off from the testimony of Mr.

Kittson, who was not a man to join in such a line of defense or to attempt so great a flight of imagination.

That, as Mr. Kittson could not and would not undertake the feat, Mr. Hill tried it alone—and that his attempt was and is a failure.

That Mr. James J. Hill, when he first met Mr. Farley, was a clerk on the levee at St. Paul for the agents of the Dubuque, Wisconsin and Minnesota Packet Company, of which Mr. Farley was president and superintendent in 1855–1857 (117-18, 135–7); and, when he met Mr. Kittson, held a subordinate position under him—Mr. Kittson being always a man of prominence and standing, forty years of age, when Mr. Hill came to St. Paul a boy of eighteen. (558, 699, 704–6.)

That Mr. Hill rose by the influence of Mr. Kittson, and by that influence alone at the beginning of this transaction, to a position in which, sustained by able men, he could overrule Mr. Kittson and betray Mr. Farley. Things change in this world, but nothing so rapidly as the relations of men to each other.

We believe that the difficulties surrounding the task which Mr. Hill set for himself, were so great, that, even in his own statement of the matter, and on the face of his own words, the failure is apparent, complete, overwhelming.

We propose, as briefly as may be, to examine Mr. Hill's testimony, and such evidence as he produced to aid him in sustaining the defense of the Prior Scheme.

We shall examine what Mr. Hill says was the Prior Scheme and what was done under it, and this will require (1), an examination as to what Mr. Hill says Mr. Smith stated or did; (2), what Hill's and Kittson's idea or plan was, and (3), what any of those parties did to carry it out.

II. Mr. Hill's Testimony.

I.

MR. HILL'S STATEMENT OF THE ALLEGED PRIOR SCHEME OR PLAN, AND WHAT STEPS WERE TAKEN UNDER IT.

1. *What Hill says Donald A. Smith stated or did concerning the alleged prior scheme or plan.*

The first mention of Donald A. Smith's statements as to a prior plan or scheme, as related by Mr. Hill, is as follows:

"In the fall of 1873, or possibly as late as the commencement of 1874, Mr. Donald A. Smith, passing through St. Paul, requested Mr. Kittson and myself, or Mr. Kittson, to get together for him information as to the condition of the property, —as to what the property consisted of."

As to railroads, terminals, rolling stock, land grant, everything, and bonded debt, "and such other information as we could get for him." (569.)

On the next page Mr. Hill further said:

"I do not recall the exact conversation at the time. The object Mr. Smith desired was to have the line completed through to St. Vincent, so as to form a connection with the Canadian government line," etc. (570, Q. 65.)

And this was in answer to a question by his counsel, "as to "why the information was desired or for what purpose it was "to be used."

Mr. Hill made the further statements bearing on the point as to what Mr. Smith said in the premises, as follows:

As part of his answer to question 68 (570) he said in refer- to Mr. Delano's suggestion or idea (bottom of page 569), about its being easier to acquire the whole property by first acquiring the branch line:

"But there was one objection to that plan by Mr. Smith; *he desired and his main object then and subsequently* was to get

the line completed to St. Vincent to a connection with the Canadian government line to Winnepeg."

As a part of his answer to question 75 (572) Mr. Hill said:

"Mr. Smith desired to have the line completed to St. Vincent and establish a connection there; he suggested a great many things in connection with it, as to the method to be pursued in securing (if it could be done) the property on a basis that would make it a profitable business operation, there were many difficulties. * * * There was a time that everybody waited, that is, Mr. Smith, Mr. Kittson and myself. There seemed no way to get in." (572, Q. 75.)

On cross-examination, being requested to state or define this period or time in which "*everybody waited*," he first evaded the question (742, C. Q. 306) and being asked again (C. Q. 307), he answered:

"A. I could not fix that particular time.

C. Q. 308. Did it commence with Mr. Smith's visit here in the latter part of 1873, or early part of 1874?

A. I should think it did not commence with the first visit.

C. Q. 309. Did it commence after the second visit by Mr. Smith?

A. I do not recall the date of the second visit." (742-3.)

Nor could Mr. Hill state whether it began before, or after, or ended with the organization of the Red River Valley Railroad Company. (743, C. Q. 310–11.)

Mr. Hill again alluded to Mr. Smith's expressions, thus:

"Q. 100. What knowledge or acquaintance had you with the proceedings in these First division foreclosure suits and Judge Hall's decision and the appeal taken from it, at or about the time when the proceedings themselves were had?

A. I was aware of what was going on at the time. I was interested, for the reason that *I thought* the interest Mr. Smith had taken in the property—his expressions—that it would ultimately lead to something under which the property would be acquired—or might be acquired. At that time, and say up to 1874 and 1875, Mr. Smith had not stated

that he was ready or prepared to take the matter up with a view of closing it. At the same time, I knew Mr. Smith's interest in it and his views, and I kept Mr. Kittson advised. I probably took more interest in it than Mr. Kittson. I kept advised of all the information I cou'd get on the subject." (580.)

The quotations above made contain all the statements by Mr. Hill in the entire course of his direct testimony, in which he stated, or attempted to state, what Mr. Smith either said to him or did, pertaining to the alleged prior plan or scheme, at any time before the meeting between them at Ottawa, in March, 1876.

On cross-examination, Mr. Hill's testimony bearing on what Smith said or did about the prior scheme, at any time before March, 1876, was substantially as follows:

"I think I testified that Donald A. Smith, in passing through St. Paul, saw Mr. Kittson *and* myself, *or* possibly Mr. Kittson, in the latter part of the year 1873." (733, C. Q. 251.)

He then fixes the months within which Smith so passed through St. Paul, as being from October 1 to March 1, 1873–4, and says:

"That is the clearest or nearest statement that I can make towards fixing the time." (734, C. Q. 256.)

Mr. Hill then proceeds to say:

"I testified that I was not certain that I had seen Mr. Smith, but that Mr. Kittson and myself, *or Mr. Kittson alone*, had seen Mr. Smith. *I think that is my direct testimony*, and I think I have answered in the same way in the cross-examination." (734, C. Q. 257.)

Such requests as Smith made, Mr. Hill admits may have come through Mr. Kittson; he does not remember the length of Smith's stay, nor how many or what character of interviews took place between Smith and Kittson, nor where they were held. (734, C. Q. 259–262.)

When asked directly whether he had seen Mr. Smith at

the time stated, (when Smith was passing through, late in 1873 or early in 1874), Mr. Hill repeated:

"I have already testified that the interview in 1873 or 1874 might have been with Mr. Kittson alone. It might have been in the presence of Mr. Kittson and myself,—I do not recollect which." (735, C. Q. 263.)

And to this Mr. Hill immediately added:

C. Q. 264. Then you are not willing to make a positive statement that you did meet Mr. Smith during the period you last stated?

A. I have not attempted to make a positive statement that I had seen him at that time.

C. Q. 265. Will you attempt to do so?

A. I will not.

Mr. Hill's particular attention being directed to what was the purpose Mr. Smith had in making the alleged request for information in 1873–4, he spoke very vaguely in answer to the questions (738–9, C. Q. 290 to 293); and being still further pressed to declare what Mr. Smith's then main object or purpose was, he refused to testify that it "was to acquire the entire property of the two last named companies." Mr. Hill put his answer (to C. Q. 293) on that specific point, in his own language, as follows:

A. Mr. Smith's object at that time, or the interest he showed in the matter, covered the entire property; *he was anxious to get information in regard to the entire property*, the First division, and all in regard to it, the Extension property, and all in regard to it.

C. Q. 294. And that, as you have designated it, was his main purpose at that time, if I understand you?

A. *That was the substance of his request at that time.*

C. Q. 295. Was it the substance of his desire at that time?

A. His request would be, *as far as I could testify, as to his desire.* Mr. Smith was a a frank, straightforward man.

In relating what was said *in the interview at Ottawa*, in March, 1876, as to Smith's then desires, etc., Mr. Hill says:

"His principal interest *at that interview* was to secure the

bonds of the First division and Extension property with a view to getting ultimate control or ownership of the property." Also not to exclude the Extention Line, etc. (767, Q. 469.)

It is noticable that at this latter interview (no doubt after Mr. Fisher's first talks with Mr. Hill), Mr. Hill does say for the first time, though not very positively, that Mr. Smith's "principal interest at that interview was to secure the bonds," etc., though Mr. Hill, in speaking of any prior request or interest of Mr. Smith's, used very guarded language, and confined himself to the statement that Mr. Smith requested "information in regard to the entire property," although at the same time he admitts such requests may have been made *to Mr. Kittson only*, and not to him, Mr. Hill, in person.

As we have now directed the attention of the court to all the testimony Mr. Hill gave, bearing on what Smith said to him, or to his knowledge of what Smith desired, planned or schemed, prior to the meeting of March, 1876, at Ottawa, we feel justified in claiming that on the face of Mr. Hill's own evidence (either on direct or cross-examination), he has not said Mr. Smith had a plan, scheme or purpose to acquire the property or the bonds, or all property of the two railroads in question, at any time prior to March, 1876, which was about the date when Mr. Fisher began talking to Mr. Hill about the Extension Line bonds, and suggested to him that those bonds might be got as low as $750,000.

Mr. Hill's testimony will not bear out the claim his counsel set up in the court below, that Mr. Smith was engaged as early as 1873-4 in a Plan, Scheme or Purpose to acquire the entire property of the two companies. It occurs to us that Mr. Hill did not consider it prudent to make such statements concerning Mr. Smith's prior plan or purpose in advance of Mr. Smith's own testimony on the point. Mr. Hill testified before Mr. Smith's deposition was taken at Montreal.

It appears Mr. Hill took extraordinary pains to talk all around the subject, but carefully and successfully avoided saying there was any Plan, Scheme or Purpose actually formed by Mr. Smith (such as counsel in his brief alleged) before the time when Mr. Fisher began with talk to Mr. Hill about the Extension Line bonds, and the low price at which they were selling in the spring of 1876.

In this connection we might properly allude to the fact that nothing whatever in writing, no letter, letter-press copy or memorandum which was written before 1876 was introduced to corroborate the theory counsel insisted upon in the court below, that there was such a "Prior Scheme," etc.

But, in order to avoid repetition, we will leave that point, and the evidence that there were letters written and press copies kept which should have been produced (789–809), to be discussed under another head.

2. *What Mr. Hill says was his own or Mr. Kittson's idea, plan or purpose in regard to the alleged Prior Scheme.*

We shall confine our remarks under this head to the statements by Mr. Hill in his testimony which embody any definition or statement whatever as to his own or Mr. Kittson's idea, plan or purpose in regard to the alleged "Prior Scheme," and shall show or directly refer to all there is of such testimony by Mr. Hill.

Mr. Hill states concerning the Delano statement prepared by Delano and Hill:

"It was given Mr. Kittson, I think, to be handed to Mr. Smith in case Mr. Smith passed through St. Paul when I or Mr. Delano were not here." (571, Q. 69.)

Mr. Hill was asked by his counsel what was said on the subject of "Mr. Delano's project," the difficulties which existed, and what was said between him, Hill, Delano, Smith or Kittson, as to obtaining the bonds as a means of acquiring the

property (571, Q. 72.) To this question, which was leading in its character, Mr. Hill answered, stating certain facts then alleged to exist, but omitted to make any statement *as to what was said.* He then went into a further statement of alleged facts and occurrences, and made the answer, in which he said: "There was a time that everybody waited, that is, Mr. Smith, Mr. Kittson and myself" (572, Q. 75); and then to the leading question (572-3, Q. 76), whether he meant to be understood: "You kept this matter *in mind*, of obtaining the property by means of purchasing the bonds, and *considered* the various difficulties in the way, and means of overcoming them? *Is that what you wish to be understood?*" he replied: "Yes, sir."

He was then examined as to whom he spoke with in regard to it, the information got from Mr. Upham, cashier, steps he took to investigate suits pending, and obstacles he became aware of (573-578); and as part of his answer to question 98 (p. 578), he used these expressions:

A. From the time when Mr. Donald A. Smith in the fall of 1873, or early in 1874, first showed *an interest in getting the road completed and afterwards*, as his interest became greater, the question of how best to get at the property for the purpose of controlling ultimately *was in my mind* and with Mr. Kittson discussed a great many times, also with other gentlemen. There were a great many law-suits in progress about that time.

After finishing the long answer in which that statement occurs, he continued to state the information he alleges he obtained and the sources thereof (579); and then made the statement under our last heading quoted in full, but which we again insert:

100 Q. What knowledge or acquaintance had you with the proceedings in these First Division foreclosure suits and Judge Hall's decision and the appeal taken from it at or about the time when the proceedings themselves were had?

A. I was aware of what was going on at the time. I was

interested for the reason that I thought the interest Mr. Smith had taken in the property—his expressions—that it would ultimately lead to something under which the property would be acquired—or might be acquired. At that time, and say up to 1874 and 1875, Mr. Smith had not stated that he was ready or prepared to take the matter up with a view of closing it. At the same time I knew Mr. Smith's interest in it and his views, and I kept Mr. Kittson advised. I probably took more interest in it than Mr. Kittson. I kept advised of all the information I could get on the subject. (580.)

Immediately following that answer is the testimony by Mr. Hill, as to his visit to Ottawa in March, 1876, on which occasion he says:

"And then for the first time Mr. Smith said to me, 'I wish you and Mr. Kittson would go on now and see at what price, if you can determine or find out, what price these bonds can be bought.'" (580 to 583. See Q. 107.)

On the next day's examination (586), what occurred before going to Ottawa in March, 1876, was inquired about, and Mr. Hill said:

A. Before leaving St. Paul for Ottawa, I had conversations with Mr. Kitson—I think several; and some with Mr. Kittson and Mr. Galusha. At those conversations, or interviews, Mr. Kittson, Mr. Galusha and myself discussed the situation of the suits—the property. The Litchfield agreement had about that time come to our notice. We also discussed the effect of the recent legislation, etc.

Mr. Hill says of the meeting with Smith, at Ottawa, on the question as to who were to be interested in the bonds or property.

"I do not recollect the particular conversation further than it was understood that if the bonds were bought, or the property secured, we would all make something out of it * * * that is, Mr. Smith, Mr. Kittson, and myself. (587, Q. 119-20.)

The matter of the Red River Valley Railroad organization being inquired about, Mr. Hill said as part of his answer:

"* * * We had discussed the matter between our-

selves, but I cannot recollect whether Mr. Smith was consulted by letter or when he was passing through here, I think, however, when passing through St. Paul." (587, Q. 124.)

And as a part of his answer concerning the purpose of building the road from Breckenridge to Barnesville, under the charter of the last named corporation, Mr. Hill testified:

"We considered that matter with a view of leasing the line from Glyndon to Crookston. (Extension line.) That would give us the control of the transportation. * * * It was also considered by us an opening wedge in the other matter. If we built that piece of road, and had the right contract arrangements for the other portions in the event of a reorganization, we would be in a better position to take advantage of anything that might come up carrying out the enterprise of securing the property." (588-9, Q. 127.)

And further, as to the matter of having a lease, he said:

"It gave us an advantage in being in possession of the Extension property; and the Extension property would be more or less valuable as we chose to make it. It would have an influence on the value of the property, and that would affect the bonds in the market." (589, Q. 128.)

In passing, we will say, and hereafter show (*infra.*), that as a matter of fact, no such idea of obtaining a lease by Kittson and Hill was thought of at the time of organizing the Red River Valley Railroad Company; but, *on the contrary*, it was proposed that if this line were built it should be operated in connection with the Extension Lines, by Mr. Farley as receiver, and on a lease of the new road to be made to him.

Mr. Hill testified that Mr. Smith was "the person who was "to negotiate the sale of the bonds and provide the money,', with which to build the proposed Red River Valley Railroad' from Breckenridge to Barnesville. (591, Q. 142.) And, finally, on this point, he testified that the road was never built because:

"We could never make a lease of the Extension property from Barnesville to Crookston, the Extension Line." (592, Q. 143.)

We have searched with much care through the entire direct testimony by Mr. Hill and have failed to find any other or further light upon the question we are now discussing, to wit: What Mr. Hill stated under oath, was his own or Mr. Kittson's idea, plan or purpose in regard to the alleged "Prior Scheme," which the counsel for the defendants insisted was entertained or pursued prior to March, 1876, and which counsel also insisted was the vital question in this case.

We have shown, we think, that on the direct examination, Mr. Hill was not asked by his counsel to state what was his own, or Mr. Kittson's, or their joint Plan, Scheme or Purpose, which they had formed or entered into with reference to the property or bonds of the two companies, at any time prior to the year 1876. Such a question, or the substance of it, was carefully omitted to be asked of Mr. Hill, and an answer upon the point was much more carefully omitted to be given.

But upon cross-examination Mr. Hill was given an opportunity by a direct question on the point, to state whether he had "any definite purpose or plan in view in reference to the property or lines," at the time of the interviews with Mr. Delano, when the written statement was prepared by Hill and Delano for Mr. Smith's information. Mr. Hill was as careful not to state he (at the time referred to) had "any defined purpose or plan in view," as he had been in his direct examination. The questions and answers to which we refer are as follows:

C. Q. 274. Did you, in the preparation of said last mentioned statement, and at the time of such last mentioned interviews with Mr. Delano, *have any defined purpose or plan in view, in reference to all of the property or lines, or all the bonds* of the St. Paul & Pacific and First Division Company?

A. *I had a definite purpose to get all the information I could on the matter.*

C. Q. 275. Was that in consequence of any plan or plans which you of your own knowledge knew Mr. Smith at that time to entertain?

A. As I understood the matter, Mr. Smith desired full information on the subject with reference to some plan looking towards completing the line; particularly the line through to St. Vincent. *I think the Canadian Government had some views in reference to the matter that had come to Mr. Smith, or they had expressed some wishes to Mr. Smith.*

C. Q. 276. Then, so far as your personal knowledge goes, the only purpose which Mr. Smith had at the time when he was so passing through St. Paul, was as a representative or agent either with full or limited powers to act for the Canadian Government in that behalf; is that right?

A. That is not right.

C. Q. 277. In what respect is it incorrect, and in what respect had you then and there knowledge to the contrary?

A. Mr. Smith's request for information was, as I understood, with a view to informing himself as to what was necessary to complete the property and to its general condition. His conversation, or communication with the government I think was purely incidental, as I understood it at the time. *It may be that the reference to the government came later than that time.* (736–7.)

Attention has already been called to Mr. Hill's testimony that there was a time when "everybody waited," and to his inability to fix that time, or when it began or ended. On cross-examination, in that connection, Mr. Hill was asked, and he answered as follows:

C. Q. 313. In the sense which you intended on the direct examination in that behalf, was the year 1875 a part of the period during which "everybody waited"?

A. There was nothing done in connection with the bondholders in 1875 as I remember, no direct communication with the bondholders or their representatives.

C. Q. 314. You mean none of which you or Mr. Kittson had to do directly or indirectly to your knowlege, do you?

A. None by Mr. Kittson, Mr. Smith and myself with the bondholders. (743.)

If, as thus testified, nothing was done from January, 1874 to March, 1876, to carry out the alleged Purpose Plan or Scheme, the proof would certainly need to be strong and convincing to induce the belief that it had any existence whatever, even in the minds or hopes of the parties.

But the final statement (the last found in the record in Mr. Hill's words), defining the prior plan, purpose or scheme of Mr. Kittson and Mr. Hill, or of Mr. Hill individually (entertained prior to the conversations with Mr. Fisher), would seem to settle the question once for all.

At the conclusion of a long cross-examination of Mr. Hill on the details of the searches he alleges he made for information (and to which we will direct the court's attention hereinafter), he was asked and he testified as follows:

C. Q. 464. Do you wish to be understood that pending the events which transpired in the years 1874 and 1875 you, or your firm, continued to be the local freight agents of the First Division Company under Mr. Becker as President of that Company, and during the struggle which was going on with reference to the property of that Company and of the St. Paul & Pacific Company, and had a definite purpose and plan of your own to become the owner or interested in the ownership of the property of both of these Companies?

A. My firm continued to handle the business of the local station at St. Paul and were paid for such service a price agreed upon by the ton and by the car. During the years 1874 and 1875, after the interview with Mr. Smith and after he had expressed a desire to gain knowledge and an interest in the property to an extent that I thought he might undertake the purchase of the bonds, *I had in my mind the formation of the plan or the hope that through that connection I would be able ultimately to be interested in the property with Mr. Kittson and Mr. Smith.* (765.)

3. *What Mr. Hill says was actually done by Mr. Kittson, Mr. Smith or himself in pursuance of, or to carry out the alleged "prior scheme."*

We have already considered and pointed out fully, (1)

what Hill says Donald A. Smith stated or did concerning the "prior scheme;" and, (2) what Hill says was his own or Mr. Kittson's idea, plan or purpose in regard thereto.

In order to complete the examination of Mr. Hill's testimony on this branch of the case, it remains necessary to consider and point out, (3) what Mr. Hill says was actually done by Mr. Kittson, Mr. Smith, or himself, in pursuance of, or to carry out, the alleged "Prior Scheme."

A careful examination of the voluminous deposition of Mr. Hill will reveal the fact that (with a few exceptions which will be noticed in their proper place) Mr. Smith and Mr. Kittson—according to Mr. Hill — did nothing whatever from, say January, 1874, to March, 1876, in pursuance of, or to carry out, any design whatever concerning the bonds or property; and such examination will further show that those things which Mr. Hill says were done in the premises from January, 1874, down to March, 1876 — the time of his visit to Ottawa — may be properly classified under three heads, viz.:

(1.) Mr. Hill's search for information on various matters and from various sources; obstacles he considered, and conversations he had with various friends.

(2.) The organization of the Red River Valley Railroad Company, and the purposes and negotiations pertaining thereto; and

(3.) The admissions by Mr. Hill on cross-examination, of his connection with the Western Railroad of Minnesota—organized with Mr. Delano as its chief promoter—*a subject entirely omitted on the direct examination of Mr. Hill.*

The long-continued search for information, and the consideration of difficulties in the way, which Mr. Hill says occupied *much of his thought* during the period referred to, require for their portrayal a great many pages of the record, a great many repetitions, and a recital of details which it would be exceed-

ingly tedious to comment upon to any great extent. But, by a division of the subject into the three parts just indicated, a sufficiently comprehensive and yet detailed statement may be made of Mr. Hill's testimony on the matters prior to March, 1876, to enable the court to judge of its weight and value in sustaining the line of defense set up by counsel as the decisive ground of controversy in this case.

We will now consider the *acts done*, as distinguished from *thoughts* and *hopes:*

(1.) Mr. Hill's search for information on various matters and from various sources; obstacles he considered; and conversations he had with various friends.

The first source of information to which Mr. Hill resorted was Mr. Delano. He says that:

"Pursuant to that (request by Smith) Mr. Delano and myself spent two or three evenings going over the matter and made a statement of the property—what it consisted of and its liabilities. Mr. Delano had been connected with the property for a long time and I had been." (569, C. Q, 63.)

The production of that statement, the proof of its genuineness as a document prepared for the purpose alleged, and at the time alleged, and its appearing to contain the statement of facts, data and information Mr. Hill says it did contain, would be of great value in sustaining the theory set up. But it is not produced. Mr. Hill was asked what was done with the statement, and he replied as follows:

"69 Q. When you and Mr. Delano together had made up the statement of which you have spoken, what did you do with it?

A. It was given Mr. Kittson, I think to be handed to Mr. Smith in case Mr. Smith passed through St. Paul when I or Mr. Delano were not here. I do not remember whether Mr. Delano or myself saw Mr. Smith at that time at his next trip through St. Paul, or not." (571.)

On cross-examination we asked Mr. Hill as to the character of that statement (735, C. Q. 266–9), and also asked him as

to its whereabouts, or if it was in his possession, power or control, or if he knew any person who did know where it was. (738, C. Q. 281 to 290). And when Mr. Smith's deposition was taken, Mr. Smith was asked a great many things about the statement, but could not find it or produce it, and did not know where it was. (1129, Q. 20 to 25; and 1157, C. Q. 25 to 27.)

Such a statement as Mr. Hill describes the Delano statement to have been, would be a valuable corroboration of Mr. Hill's testimony, and, if it had been preserved, or a copy of it had been made at the time (*early in 1874*), it would undoubtedly have saved Mr. Hill a large part of the two or three years of work and investigation which he says he carried on in pursuit of facts, information and data, such as the Delano statement is supposed to have contained. But should it on production appear to be confined to the Branch Line matters and to the data pertaining to Mr. Delano's Western Railroad Company (from Brainerd to St. Cloud and St. Cloud to Mankato, etc.), *it would be to the defendants a damaging document.*

Our suspicion that the character of the Delano statement was not such as Mr. Hill describes it to have been, but one relating to Mr. Delano's proposed road, is borne out by Mr. Smith. He testified, on cross-examination:

"Taxing my memory, the impression on it now is, that while Mr. Delano was able to give a very great deal of information with regard to the road generally and the position in which the bonds and other securities were, *he was not so familiar with that portion of it in the main line*,—that is to Breckinridge, as with the other from St. Cloud and on the Extension to St. Vincent. (1174, C. Q. 116.)"

The non-production of the statement, Mr. Smith's answer just given, and the fact that Kittson and Hill were both made directors in the Delano road, in January, 1874, point to the conclusion that the matter then discussed was not the entire

property of the two old companies, but Mr. Delano's project of the new company.

Mr. Hill says that within the period from 1874 to 1876 he spoke of the matters he had in mind to his friends, Mr. Delano, Mr. Kline, Mr. DeGrave, Col. Uline, Mr. Young, Mr. Upham, Mr. Newell and Mr. Galusha. (573, Q. 77 to 79.)

Mr. Delano was dead before Mr. Hill testified; Messrs. Kline, DeGrave, Uline and Young were not called as witnesses; Messrs. Upham, Newell and Galusha were called. We will consider how far they corroborated Mr. Hill when we come to their testimony. (*infra.*)

The next source of Mr. Hill's information, as he testifies, was Mr. H. P. Upham, who was dealing in bonds in 1874, and received letters from Dutch bankers "advising him of the condition of the market and the general situation." Mr. Hill says "There was a man from Holland, I think in the winter of 1874, early in the winter of '74—LeClercq; he came here and Mr. Delano brought him to me." This Mr. LeClercq sent Mr. Hill a Dutch paper, the "Financier" (whether one copy or more Mr. Hill did not state), containing articles which a Mr. Kline translated for Mr. Hill; but neither the translations nor the paper or papers were produced, nor were Kline or LeClercq produced or accounted for. (574.)

Mr. Hill says he "had a great many conversations, and got all the information from Mr. Upham that he had on the subject." He states at considerable length the nature of the information which was so communicated to him, and gives the custom of the Amsterdam Exchange. (574–5–6.)

That testimony was given on March 28, 1888 (beginning on page 556); three days afterwards, on March 31st (620), Mr. Hill brought into the examiner's office two original letters written to the First National Bank of St. Paul by the Dutch bankers, Lippmann, Rosenthal & Co., containing information,

prices and statements in regard to the Dutch Committee, and Mr. Hill *testified positively* that both those letters had been shown to him and read by him at the time they were received, and that Mr. Upham was the man who showed them to him; and as to the first one particularly, he said: "Mr. Upham and myself read the letter together at his office in the bank." Those two letters were introduced in evidence as Defendants' Exhibits 15 and 16, and bear date March 23, 1874, and April 1, 1874. (916, 917.)

That testimony by Mr. Hill will be found on pages 620 and 621, and the exhibits 15 and 16 on pages 916 and 917 of the record.

But this testimony by Mr. Hill, positively that he saw the Lippmann, Rosenthal & Co. letters at the time they were received in St Paul, *is not corroborated by Mr. Upham*, who was particularly asked on that subject, on re-direct examination, very soon after Mr. Kittson's death. The two letters of March 23 and April 1, 1874 (Exhibits 15 and 16, *supra*), and two additional letters from the bankers in Amsterdam, dated June 2 and 13, 1874, were shown to Mr. Upham—the first two had been produced upon Mr. Hill's examination—and Mr. Upham identified them as genuine letters received in the regular course of the bank's business (1,116, 1,117, R. D. Q. 19 to 27); and he was then asked by the defendant's counsel (after a long cross-examination, in which he had broken down pitiably):

"R. D. Q. 28. State whether you showed either of these four letters from Lippmann, Rosenthal & Co., which are in evidence, to James J. Hill, at or about the time of your receipt of the same, according to the best of your recollection?"

To that question, Mr. Upham replied:

"A. I cannot say."

And Mr. Upham was asked nothing further by either side.

The failure to produce the Delano statement or an authentic

copy of it, is not, in our opinion, so serious or damaging to the credibility of Mr. Hill, as is this complete breaking down and failure of the attempt, which was made to corroborate Mr. Hill's positive testimony that he saw the private foreign correspondence, which was addressed to the First National Bank of St. Paul in the spring of 1874, relating to the Dutch bonds and Dutch committee.

Mr. Hill went further in the statement of the sources of his information by saying that he had examined the files of the United States Circuit court in the Kennedy case, and on their being shown to him, identified the power of attorney from Lippmann, Rosenthal & Co. to Kennedy (Defts. Ex. 3), and a printed copy of the bill and affidavits made use of at the time of the appointment of the receiver of the extension line (Dfts. Ex. 5); both of which papers bear the file mark of the court under date of December 21, 1874.

Those papers Mr. Hill says he examined at the clerk's office, and concerning the latter, the printed papers, he said:

"A. I remember particularly portions on page 20 and 21 which refer to two firms with which I was connected. Hill, Griggs & Co., and Armstrong & Co. were the firms. I remember afterward of having a copy of that paper book." (578, Q. 97.)

Mr. Hill further says that he recollects in 1873 a petition; it is set forth in the last paper (Defts. Ex. 5), being the printed book containing the reference to Hill, Griggs & Co., and Armstrong & Co., and which is above referred to, and which petition moved for a receiver, etc., in the State court. He says:

"As I remember, the petition for a receiver for the First Division before Judge Hall was denied and was appealed to the Supreme court of the state. If there ever was a decision in the matter by the Supreme court I do not recall it." (579, Q. 99.)

That information which he had, he got from the printed

book, and it is manifest that the next answer is based on the same source of information, where he says: "I was aware of what was going on at the time. I was interested for the reason," etc. (580, Q. 100.)

Mr. Hill says that there was legislation to prevent the building of the Breckenridge & Barnes cut-off. He also says that:

"Mr. Delano was a member of the house and introduced some legislation looking to compelling the bondholders to either finish the road or forfeit their right to finish it." (581.)

At this point we again call attention to Mr. Delano's speech delivered February 23, 1875, 500 copies of which were ordered printed for the use of the house, and a copy of which was furnished Mr. Smith at the time of its delivery, and which speech contains the outline of the Delano scheme, in furtherance of which the Western Railroad Company of Minnesota was organized by Mr. Delano, together with Mr. Hill and Mr. Kittson, all of whom were directors. (The speech is on pages 1273–1294, and the charter of the Western Railroad Company is on page 1730.)

Pursuing further the subject of Mr. Hill's examination of court records in seach of information, we will call attention to the long and exhaustive cross-examination, in which Mr. Hill was particularly asked as to the sources of his information as to suits pending in the years 1873, 1874 and 1875. Such cross-examination begins on page 747 (C. Q. 338), and extends to page 753 (C. Q. 390); and begins again on page 755 (C. Q. 401), and extends forward to page 763 (C. Q. 456.)

In the course of that examination it became quite clearly apparent that the only court that Mr. Hill visited to examine the files, was the United States court, and that he only examined the sworn bill in the Kennedy case, in which a charge was

made concerning Mr. Hill's firms of Hill, Griggs & Co., and Armstrong & Co.; as follows:

"* * * that among other things the First Division company made contracts with Hill, Griggs & Co., and Armstrong & Co., giving them the exclusive right to carry lumber and wood over the main line; and by means thereof the value of timber lands along that line, and the price of lumber and wood in St. Paul, and consequently the business of various kinds dependent on the preparing and using timber and wood, are placed under the control of those parties and *subjected to their overcharges and exactions*, and the traffic of the railroad is greatly impaired: that on said lines and about fifty miles from St. Paul there is a heavily timbered tract, extending about forty miles along said line and of about thirty miles wide on each side, capable of furnishing railroad ties which are greatly in demand, and the timber is wanted in the market for many purposes; that of said tract the said First Division company owns 400 sections; that by reason or by color of said contract and the complicity of some of the officials or agents of said First Division company in the same, said company has failed for the last three years to obtain the benefit of its said timber property, and is still suffering great loss by means thereof, and such losses are remediless; *that said contracts are for an unauthorized and unlawful monopoly*, and were made in breach of the law and of public rights, and they are producing *great harm to the business and trade of citizens* as well as to the traffic of the railroad and the lumber interests of the said company, and are exposing said company to the danger of being proceeded against by the state government for breach of charter and public obligations, which already has been threatened by a motion in the legislature of Minnesota." (856.)

We are inclined to think that such charges as were thus made, probably would and did bring Mr. Hill to the court house to examine the files and to find the bill of complaint in which the charges were made and sworn to by Mr. John S. Barnes. But we seriously doubt whether Mr. Hill, (at the time he was in the clerk's office reading the charges against his alleged "overcharges," "exactions," and "unlawful monopoly," which by action in the legislature were threatening the charter of the First Division company), was think-

ing about becoming an owner, or even hoped to become interested in the entire property of the railroad company with which his firm of Hill, Griggs & Co., then had such contracts.

After the cross-examination to which attention has been called, and in which Mr. Hill was asked as to the sources of his information and *data*, he was asked by his counsel in what suits he had, prior to 1876, printed matter, and the nature of such printed matter. To this he replied that he had (1) copies of the mortgages (on all the lines), and (2) paper books covering the suits for foreclosure under the four mortgages,—being probably the paper books Mr. Newel produced (submitted to Judge Young while on the bench), and which he testified Mr. Hill had had access to in the office of Young & Newel in the spring of 1875. (See Newel's testimony, 1,320, Q. 18.)

A printed copy of the mortgages, bearing the imprint of the "St. Paul Press Printing Company, 1873," was shown Mr. Hill, and he testified that the book of mortgages of which he spoke in his cross-examination was, as he remembered, "a book entirely similar to this book." (825, R. D. Q. 3.) But as Mr. Hill would not testify the book produced was "the identical copy furnished him" by Mr. Otis, but said, I think it is not," (829, R. C. Q. 1), and further stated, "My counsel, Mr. Bigelow, tells me that he has two or three copies that he will furnish at any time," (829, R. C. Q. 5), complainant's counsel called Mr. Bigelow on rebuttal and asked him to produce such copy, and Mr. Bigelow did so. (1,688–90.)

But we point out that Mr. Hill did not produce the copy which he says he saw prior to 1876, but only testified that Mr. Otis (who died some five or six years ago), *showed him such a copy*. (761–2, C. Q. 439–445.) And we insist that the production of the printed copy without showing where it came from, has no more force as evidence than Mr. Hill's mere statement and does not tend to corroborate him. That such a book

did exist and that Mr. Otis may have had a copy of it, may be true, but that Mr. Hill had it or saw it before 1876, *rests solely on his unaided testimony*,

Mr. Hill says there were obstacles surrounding the property, and that changes occurred in that respect from time to time. This we do not deny. (572, Q. 75; 578, Q. 98; 580, Q. 102.) But all the knowledge he testified to on such matters he could easily have obtained afterwards.

Mr. Hill seems to have palpably contradicted himself by the testimony that he had his counsel look up the legal status in 1874, and keep close watch on the progress of the different suits. He testified;

C. Q. 317. Then during those years of 1874 and 1875 no further active steps were taken, if I understand you, than the negotiations with Mr. Farley, or the making of said statement in writing, or your personal inquiries into the general situation as you testified on direct examination; is that right?

A. At my request, my counsel looked up the legal status in 1874—I think early in 1874—and close watch was kept of the progress of the different suits with a view, at the proper time, to take action if our friends could settle what was desirable action to take in the matter, or if the progress of the matter developed a condition of things which would make it desirable for us to take such action. (743-4.)

But the futility and worthlessness of such testimony became apparent when he was next asked, as follows:

C. Q. 318. Was there any written opinion or statement prepared by any counsel which you had in the year 1874 or 1875, which you can produce, and which will show the nature of the investigations which were then made by such counsel in your behalf?

A. I do not know that I have any such written statements; do not know that written statements were made. (744.)

If Mr. Hill had legal counsel to examine into such suits as early as he said he did, *why the necessity of his doing so in person by going to the files in the different courts?* And if counsel had made examination into such complicated affairs, would not

some docket, memorandum, opinion or statement be found *to evidence the work done?*

Mr. Hill made prominent the matter of the Litchfield agreement as a moving cause for action on his part in March, 1876. That agreement was one between the bondholders and stockholders for a scaling down of both the bonds and stock, and an adjustment of affairs. (1508–35.) That matter then coming to his knowledge, Mr. Hill says, rendered it necessary that some action should then be taken. He testified that he did not know the terms of the agreement, so far as where it provided for an adjustment, etc., until a short time before he started for Ottawa in March, 1876; and he fixes the length of time in which he knew it before starting, as less than one month.

On the matter in question his testimony was as follows:

C. Q. 516. Did you not as long as a month, say, before that conference with Mr. Kittson and Mr. Galusha, before you started to Ottawa, in March, 1876, have knowledge that the Litchfield agreement had been already signed?

A. I do not think we had knowledge of the date when the agreement was signed. That matter was, as I remember, kept very close. I did not know the terms of the agreement so far as where it provided for an adjustment or settlement of the matter between the stockholders and the bondholders, until a short time before I started for Ottawa.

C. Q. 517. When you say "a short time," please state how long you include within such expression?

A. It might have been a few days; it might have been a week, or it might have been ten days.

C. Q. 518. Might it not have been one month?

A. I think not. I think it could not have been one month. (775.)

In his direct testimony Mr. Hill had already testified as to this matter:

"* * * I, however, knew *nothing of these negotiations* until about the time they were completed. Possibly in February, but certainly in March, 1876, I knew that a compromise

had been agreed upon with the Litchfields." etc. etc. (580, Q. 102.)

But Mr. Hill is as unfortunate in his statements of what he did not know, as in stating what he did know; for it appears that the "Pioneer Press," of St. Paul had published an article as to the negotiations being pending in the matter between the bondholders and stockholders, on August 25, 1875; and the substance of the agreement was pretty fully published in another article in the same newspaper at St. Paul on October 20, 1875; both of which articles were by complainants' counsel shown to Mr. Hill while he was on the witness stand; and he admitted as to the first article: "I think it is very probable I saw it at the time," and as to the second article, "I have no doubt I saw that article." (789 to 793.)

We believe we have stated the substantial effect and pointed out the bearing of all Mr. Hill testified to in the way of his searches for information, the obstacles he considered, and what he said to his friends as to the alleged Prior Scheme, at any time prior to March, 1876. We submit that the testimony adduced does not bear out the claim based upon it by defendants' counsel in the court below.

Under the head of *alleged acts*, pertaining to the Prior Scheme, we will now consider.

(2.) The organization of the Red River Valley Railroad Company, and the purposes and negotiations pertaining thereto.

As a preliminary to this subject Mr. Hill testified at considerable length, to his early business experience on the Red River of the North, related his visit to Manitoba in 1870, referred to Mr. Kittson's long career as a steamboat man and trader, and to his own venture in building a boat to compete with Mr. Kittson's line, and to the consolidation of their inter-

ests and the organization of the Red River Transportation Company after his boat had been running for a year. He placed the date of the organization of the Red River Transpartation Company a year before it occurred. (560–1, Q. 24; and see the charter of the company, 1,732, Ex., 242.)

On cross-examination Mr. Hill admitted substantially that this early business was all done *by his firms*, and that after the joint arrangement with Mr. Kittson, the latter ran the boat business, and he continued *with his firms* in the wood and coal business, and handled the local freight of the First Division Company. (721 to 726.)

The situation of affairs on the extension line and on the Red River during 1874 and 1875 was such that navigation southward beyond a point near Crookston was difficult, and the Extension Line was completed no further north than Crookston. Hence an arrangement to utilize the Extension Line from Crookston southward to Glyndon was talked of between Mr. Fisher, Mr. Farley and Mr. Kittson, as early as the winter of 1874, and indeed a running arrangement had been made between Mr. Kittson's boat line and Mr. Farley as receiver in September, 1874. (200, C. Ex. 25.)

On direct examination Mr. Hill referred to this condition of affairs, and the beginning of the talk which led to the organization of the Red River Valley Railroad Company. He was asked and testified as follows:

Q. 58. When your Red River Transportation Company first began doing business with Mr. Farley, as operating the St. Vincent Extension Railroad, where did your company receive the freight from that line?

A. I think a few trips were made to Crookston; after that a line was built from Crookston to a point that was called Fisher's Landing.

Q. 59. Situated where?

A. About fourteen miles from Crookston, down the Red Lake River—about fourteen miles west of Crookston, at a point on the Red Lake River below or farther down the

stream, to a point above which navigation was very difficult. (569.)

He was next asked as to the Spur Track which was built over the fourteen miles.

Q. 60. By what company was this road built from Crookston to Fisher's Landing?

A. By the Red River Valley Railroad Company.

Q. 61. Who was instrumental in organizing that company?

A. Mr. Kittson and myself. (569.)

As to Mr. Smith's connection with the proposed road, Mr. Hill testified:

" * * * We had discussed the matter between ourselves, but I cannot recollect whether Mr. Smith was consulted by letter or when he was passing through here; I think, however, when passing through St. Paul. * * * (587, Q. 124.)

And on cross-examination:

C. Q. 244. Will you please state to the best of your present recollection the attitude in which Mr. Smith stood with reference to the subject-matter of building the connecting line from south of Glyndon to Breckenridge, in the year 1875?

A. In the year 1875, Mr. Smith, as I recollect, pursuant to an understanding arrived at with Mr. Kittson and myself, was ready either to furnish the money or negotiate the securities to build the road from Breckenridge to Barnes provided an arrangement that was satisfactory for the operation of the line, could be made.

C. Q. 245. Did you undertake or engage in the effort to obtain a satisfactory arrangement with reference to that matter in the year 1875?

A. There was several conversations in regard to the matter. I had several conversations with Mr. Becker on the subject, in regard to the connection with the First Division, and possibly some with Mr. Farley. *I think quite likely some with Mr. Farley on the same subject.* Mr. Kittson was present I think at most of the conversations.

C. Q. 246. What was the character of the arrangement with reference to the building of that Link line which was desired on behalf of Mr. Smith, if any, in the year 1875?

A. I think Mr. Smith intended, and did, leave the matter

of the arrangement mainly with Mr. Kittson and myself. (732.)

On cross-examination Mr. Hill was asked more particularly as to who made the early arrangement with Mr. Farley and Mr. Fisher—whether Mr. Kittson or himself—and he testified that it was Mr. Kittson who acted for the boat line in the matter. He answered as follows:

C. Q. 216. After Mr. Farley was appointed receiver of the St. Paul and Pacific Company's property, and after he, as such receiver, began to have business relations with the line of boats on the Red river with which Mr. Kitttson and yourself were connected, who came mostly in contact with Mr. Farley with reference to that business—yourself or Mr. Kittson?

A. Mr. Kittson, I should say.

C. Q. 217. To what extent did you personally at that time—say before the beginning of the year 1875—have personal interviews with Mr. Farley pertaining to that last named business?

A. *I could not testify as to the number of interviews I had with Mr. Farley on that business.* (728.)

And, further on, he testified:

C. Q. 229. Was the principal portion of the negotiation or arrangment, whatever it was, which was made as between the Red River Valley Railroad Company on the one hand and Mr. Farley as receiver on the other, had with you, or with Mr. Kittson?

A. I think with Mr. Kittson.

C. Q. 230. You, then, are not able to testify how many times nor on what occasion Mr. Farley or his assistant held interviews during the year 1875 with Mr. Kittson on that business?

A. I could not testify how many interviews Mr. Farley or his assistant held with Mr. Kittson on that business. I was not with Mr. Kittson or with them all the time.

C. Q. 231. Mr. Kittson at that time was the head officer of the Red River Transportation Company, was he not?

A. Yes, sir.

C. Q. 232. As such head officer it would be his business to undertake whatever responsible action was required on the part of said Transportation Company, would it not?

A. Yes, sir. (730.)

C. Q. 233. What person or corporation furnished the money to pay for the labor and grading which was done between Crookston and Fisher's Landing in the year 1875?

A. The money to pay for that line was furnished by the Red River Transportation Company, as I remember. (731.)

And, again:

C. Q. 237. Did the Red River Valley Railroad Company own any cars or engines?

A. I do not think it did.

C. Q. 238. Was there ever, to your knowledge, prior to the year 1876, any cars or engines operated over the line from Crookston to Fisher's Landing, except such cars or engines as Mr. Farley as receiver, operated thereon?

A. I do not know of any. (731.)

It thus appears from Mr. Hill's admissions (aside from the positive testimony of Mr. Farley and Mr. Fisher), that Mr. Kittson was in charge of the boat business in 1874 and 1875 as the active man and head of affairs, and that the negotiations and conferences had as to the running arrangements, and the subsequent negotiations with reference to the proposed building of the Red River Valley Road (the Cut-Off or Link line, which, however, was not built by that company; but was built by a company organized in 1877, to use the money then sent by the bondholders for that purpose, 292, 297, 298), and the actual building of the fourteen miles of Spur Track, was all of it business between Mr. Fisher, Mr. Farley and Mr. Kittson, with which Mr. Hill had very little to do.

But Mr. Hill makes a claim that the organization of the Red River Valley Railroad Company *was with the distinct object and purpose*,

First. To build a road from Breckenridge to twelve miles south of Glyndon, and

Second. To secure a lease of the Extension line from the end of the newly to be built road, northward to Crookston, and

Third. That this was considered as an opening wedge in

the other matter—*in carrying out the enterprise of securing the property.*

Mr. Hill puts this matter and this claim in his own language as follows:

127 Q. What was your purpose in desiring, prior to 1876, the building of a road from Breckenridge to Barnes?

A. We considered that matter with a view of leasing the line from Glyndon to Crookston. That *would give us* control of the transportation from Breckenridge by rail to Crookston; and subsequently, when the branch line, or Red River Valley road was built from Crookston to Fisher's Landing, give us control to that point, and by boat from there to Winnepeg. And also would avoid the necessity of having all goods coming by the way of St. Paul sent around by the Northern Pacific Junction. In that regard it affected our Red River Transportation Company's business. *It was also considered by us as an opening wedge in the other matter.* If we built that piece of road and had the right contract arrangements for the other portions, in the event of a reorganization, *we would be in a better position* to take advantage of anything that might come up *carrying out the enterprise of securing the property.*

128 Q. What effect, if any, did you consider that the construction of the Breckenridge-Barnes line by yourselves, and the having of a lease of the line from Barnes to Crookston, would have upon the residue of the St. Vincent Extension—that is, from Crookston to St. Vincent—in case that road should be built, or attempted to be built?

A. If the line was to be built from Crookston to St. Vincent, the transportation and material would have *to pass over our line*, and our controlling it would give us a revenue—would give us a considerable income—out of the material, or it might delay the construction of that line. It gave us an advantage *in being in possession of the Extension property*; and, the extension property would be more or less valuable, as we chose to make it. It would have an influence on the value of the property and that would affect the bonds in the market.

129 Q. If you had a lease of the line from Barnes to Crookston, how could the line from Crookston to the boundary at St. Vincent be operated by others than yourselves?

Objected to by complainant's counsel as incompetent, irrelevant and immaterial.

130 Q. What connection would it have with any other railroad?

A. It would be only operated as an extension of the line from Barnes to Crookston," (588-9.)

Mr. Hill further testified on the matter of obtaining a lease of the Extension Lines:

"A. It was considered, for the reasons I have named, an advantageous thing for us, in connection with the Red River Transportation Company, *and the railroad matter, and it was considered a necessity as securing us.*" (590, C. Q. 132).

We assume that the only object counsel had in obtaining this testimony from Mr. Hill was to show *some act done* in pursuance of the alleged Prior Scheme to acquire the entire properties, *before the time* when Mr. Fisher began his conversations with Mr. Hill.

The long delay from say January, 1874, to March, 1876, in which nothing whatever was done toward carrying out a scheme to acquire the property—a scheme having for its basis testimony that certain things were had in mind, and certain things were hoped for, growing out of a request for information and followed by searches for such information—would certainly call for proof *that some act was done, some step taken —some overt act*—to sustain the rest of the proofs adduced. To that end we assume the proof was introduced which we have quoted—viz, that when the Red River Valley Railroad Company was organized it was an overt act—*with the purpose and design accompanying the act*, of acquiring the entire property through its instrumentality or its aid.

The claim thus set up by defendants' counsel in the court below, and the proof given by Mr. Hill to sustain it, is successfully rebutted by certain written evidencep reserved upon, the letter books of Mr. Farley, copied therein in the spring of 1875, being the memorandum of the proposal which Mr. Kittson and Mr. Hill made, just before the Red River Valley

Railroad Company was organized, of the terms upon which they would undertake to secure the money to build the road;—and the letter to Kennedy & Co., on the subject, July 17, 1875, in which the said memorandum embracing the subject is referred to. The 3rd and 4th clauses of the memorandum shew that it was proposed that the new road when built *should be leased to the receiver*, and that the guarantee required was an agreement to deliver freight to the Transportation Company for a term of two or three years. Those articles are as follows:

3rd. Mess. Kennedy & Co. to agree to ask the court to authorize the receiver *either to lease this 30 miles of road* paying therefor 7 per cent. on actual cost, *or to make an agreement to operate this 30 miles* in connection with the line from 12 miles south of Glyndon to Crookston, keeping an accurate account of earnings and expenses and pay the new company *pro rata* per mile of the net earnings.

4th. An agreement to deliver all the Manitoba freight to the Red River Transportation Co. at Crookston for two or three years, or to agree to charge them the same rate per mile from St. Paul and Minneapolis to Crookston that they will charge to Snake River (at present the north end of track), or to Saint Vincent (in case they build to Saint Vincent)—*This agreement only to extend to two or three years.* (1,707, Ex. 214.)

Mr. Fisher testified on rebuttal, with the letter book before him, that the memorandum was made "between the 20th and 24th of April, 1875," (1657, Q. 15); and that "that statement was made as a result of conversations with Mr. Kittson, Mr. Hill, Mr. Farley," and himself. (1,657, Q. 16.)

We claim that Mr. Hill's testimony, on this branch of the case, viz: (2.) The organization of the Red River Valley Railroad Company and the purposes and negotiations pertaining thereto, is not sustained.

In conclusion, under the head of alleged acts, pursuant to a prior scheme, we consider:

(3.) Admissions by Mr. Hill as to the Delano Scheme, and the Western Railroad Company of Minnesota.

We have already considered the alleged written statement prepared by Mr. Delano and Mr. Hill, containing, as Mr. Hill testified, information Mr. Delano was able to give; and we have commented upon the fact of its not being produced. We have also shown that Mr. Smith testified that Mr. Delano "was not so familiar with that portion of it in the main line" as with the other portion of the road. And we have argued that the statement in question probably pertained to the project Mr. Delano was interested in, and in which he endeavored to interest Kittson and Hill and which they brought to Mr. Smiths' notice in the spring of 1875.

There is other evidence in the record and much in Mr. Hill's deposition tending to show that the Delano scheme was all the scheme or plan the parties considered or did anything about in the year 1874, or at any time down to the spring of 1875, when the Red River Valley Railroad Company was discussed and organized.

Mr. Hill testified to his intimacy with Mr. Delano. He said:

"A. I knew Mr. Delano from 1859 or '60 up to the day of his death; and from 1862–3, and from the time that the St. Paul & Pacific built the trestle work from the line where the railway crosses 3d street near the St. Paul & Duluth bridge up to the levee, or up to Sibley street, in St. Paul, *I knew Mr. Delano very well—intimately.* Saw him frequently, and had occasion to see him often." (566, Q. 48.) * * * Mr. Delano suggested that the better way, or easier way, to to get control of the entire property would be to first control what was known as the Branch Line, running from St. Paul to St. Cloud, inasmuch as that line had four mortgages," etc. (569, Q. 64.)

67 Q. You have spoken of Mr. Delano's idea that it would be more feasible first to acquire the Branch line as a thing by itself, and then subsequently, if desired, to go on and get the

Main Line and the Extension; What reply did you make to this suggestion of Mr. Delano?

A. *Oh, that matter was discussed a great deal.* I don't recall the particular language. (570, Q. 67.)

On direct examination Mr. Hill omitted all mention of the Western Railroad Company, *and of his being a director therein.* But on cross-examination he testified:

C. Q. 23. Fix the date at which you became a director of the Western Railway Company of which you have just spoken?

A. *I think I was one of the original incorporators.*

C. Q. 24. When was that last mentioned company incorporated?

A. I do not recall. It is a matter of record in the secretary of state's office.

C. Q. 25. Give your best recollection?

A. *I would put it about the summer of 1875,* (701.)

But, as a matter of fact, the company was organized *simultaneously with Mr. Smith's request for information,* and on January 29, 1874. (Charter, p. 1,730.)

C. Q. 28. You spoke of the principal object of the organization of that company; whose principal object was it; do you mean your own?

A. The object of the parties who started it.

C. Q. 29. Did you include yourself as a party having an object in the premises?

A. Yes, sir; *the object was explained to me at the time.*

C. Q. 30. You mean at the time of the organization of said last named company?

A. Yes, sir; and prior to the organization—prior to the time the company was incorporated. (702.)

The complainant on rebuttal introduced a certified copy of the charter of the Western Railroad Company—the articles being signed January 29, 1874, and filed on January 31, 1874, the incorporators and first board of directors being as follows:

Article 5. The names and places of residence of the persons forming this association for incorporation are as follows,

viz: F. R. Delano, Saint Paul, Minnesota; C. W. Griggs, Saint Paul, Minnesota; N. W. Kittson, Saint Paul, Minnesota; L. E. Reed, Saint Paul, Minnesota; P. H. Kelly, Saint Paul, Minnesota; T. P. McQuillon, Saint Paul, Minnesota; Jas. J. Hill, Saint Paul, Minnesota.

Article 6. F. R. Delano, N. W. Kittson, C. W. Griggs, L. E. Reed, P. H. Kelly, P. F. McQuillon and James J. Hill, shall constitute the first board of directors, etc. (1,731–2.)

It would seem that this documentary proof is all that is needed to substantiate Mr. Fisher's and Mr. Farley's testimony that Mr. Kittson told them he once had a good deal of talk and figuring with Mr. Delano about becoming the owners of the Branch Line property, but it resulted in nothing—it did not amount to anything. (1,373, 1653.)

It would also seem exceedingly probable that if Mr. Kittson's letters and correspondence with Mr. Smith had been produced, and if Mr. Kittson had been called to corroborate Mr. Hill in place of the other corroborating witnesses, Galusha, Upham, Newel and Saunders, more definite and reliable information as to the prior transactions, between 1874 and 1876, would have been imported into the record.

And it would seem, in view of Mr. Hill's vague memory of the time when the Delano agitation and Delano road were going on and organized, that the written matter, showing *what was done and the purposes thereof*, are far more reliable than Mr. Hill's words.

That there was correspondence on this matter from 1874 to 1877, and that Mr. Kittson kept in his office such a copy book, is shown by the evidence. Mr. Hill testified on cross-examination (789):

A. I made, I think, copies of correspondence in regard to the business between Mr. Kittson, Mr. Smith and myself, in a book which was kept in Mr. Kittson's office. That is my recollection.

C. Q. 601. Is that book now in your possession, power or control?

A. No, sir; it is not.

C. Q. 602. Where, to the best of your knowledge, is that book now?

A. It may be in Mr. Kittson's office; I assume it is; it was there when I last saw it.

And Mr. Hill testified that the various propositions to, and correspondence with Mr. Carp, during the negotiations with the Dutch Committee, were copied in a letter-book which Mr. Kittson kept in his office. (816, C. Q. 703 to 706.)

Mr. Kittson not having been called as a witness by the defendants, after his death, complainants' counsel called the officers of the defendant, St. Paul Trust Company, his Executor, and tried to obtain the letter book in question, and the other written correspondence, which Mr. Kittson may have had at the time of his death. But this effort to get before the court this written evidence, that it might be compared with Mr. Hill's oral statements on his alleged Prior Scheme,—the vital point of his case, as his counsel below considered, was without avail. (1696 to 1700.)

On the contrary, the complainant's letter books were brought into court and offered to the defendants for their examination. (388, offer made following C. Q. 366.) And the defendants had full access to all letters by complainant to Kennedy & Company during the entire period of these transactions. (1639, objection at top of page.)

This completes our examination of Mr. Hill's entire testimony bearing in any way on a supposed scheme in which Mr. Hill was a party, existing *prior to the spring of 1876*, for the acquirement of the railroads in question.

No wonder that counsel, in looking over the evidence to sustain the theory of a prior scheme existing from 1874 to 1876, seeing the unsubstantial nature of the evidence and its utter lack of foundation, remarked concerning it in his brief in the court below (bottom of page 153), as follows:

"It is not claimed that so early as January, 1874, this enterprise was complete in all its details. But the project was there, and it will be shown that it was diligently pursued until the opportune time came to carry it out."

When, before 1876, if not in 1874, did the enterprise become complete in *any* of its details? "The project" "was diligently pursued" "until the time came to carry it out." How could that be? Could it be said, for instance, that a carpenter diligently worked on a door until the time came to make it? "But the project was there." The question is, Where? In Mr. Hill's imagination? In his mind? In his hope? That is about the way, indeed, that Mr. Hill stated it.

II.

MR. HILL'S STATEMENT OF EVENTS AFTER HIS VISIT TO OTTAWA IN MARCH, 1876, DOWN TO THE END OF THE FORECLOSURE SALES IN MAY OR JUNE, 1879.

This portion of Mr. Hill's testimony may be divided into three parts for convenience in its consideration, viz.:

(1) The negotiations for the purchase of the bonds, in their order, with John S. Barnes, John Carp, the Dutch committee, and finally with John S. Kennedy & Co., as agents of the committee;

(2) The dealings of the associates, Kittson, Hill, Smith and Stephen, with each other; and

(3) Their dealings with Mr. Farley as an associate or otherwise.

1. The negotiations for the purchase of the bonds.

(1) The Barnes negotiation: Mr. Hill testifies that he and Mr. Kittson had an interview with Mr. John S. Barnes at St. Paul very soon after he and Mr. Newel had met Mr. Barnes on the train between Chicago and St. Paul. (584–5.)

Mr. Farley testified he had introduced Kittson and Hill to Mr. Barnes, and the letter by Mr. Barnes to Mr. Farley of June 19, 1876, bears out that statement by Mr. Farley, for the letter says: "I have much to say to you regarding matters *that we have talked of* with our St. Paul friends, Mr. Kitchen and Mr. Hill," etc. (253, Comp. Ex. 89.) It is much more propable that Mr. Hill and Mr. Kittson desiring to approach Mr. Barnes on the matters in question, would have been better pleased to have Mr. Farley present them to Mr. Barnes than to rely upon a chance acquaintance "scraped" with Mr. Barnes on the train (during the ride, when as Newel and Upham say, Mr. Barnes was using "his pump" on Mr. Hill. Whatever Mr. Hill's inclination might have been in approaching Mr. Barnes, it is quite probable that Mr. Kittson, at least, would have preferred to be presented to the new president of the road by the general manager, when broaching so important a matter as the purchase of the property itself. (585.) Mr. Barnes had paid his compliments to Mr. Hill in the sworn averments in the Kennedy bill concerning "exactions," "overcharges" and monopoly," under a contract Mr. Farley put an end to on becoming manager, which doubtless was discussed with Mr. Barnes at once on his arrival. It is probable in view of these facts, if not for other reasons, that Mr. Hill was not made so prominent in the first negotiations as was Mr. Kittson. Indeed the letters from Mr. Farley to Mr. Barnes of June 3d and August 23, 1876, mentioning Mr. Kittson alone, and the fact that the telegram of August 16, 1876, making a very important inquiry was signed by Mr. Kittson alone, bear out this assumption. (1,492, 992.) This also may have had something to do with Mr. Barnes' disinclination to deal with Kittson and Hill, or give them satisfaction in the first instance.

Mr. Hill testified that Mr. Farley spoke of the matters discussed with Mr. Barnes. He says:

A. A short time after our interview with Mr. Barnes, Mr.

Farley spoke of it and spoke of it several times during the summer. I think his conversations were more with Mr. Kittson than with me. (587, Q. 121.)

Mr. Hill's evidence on this point is that a "short time after our interview with Mr. Barnes, Mr. Farley spoke of it," etc.; but the letter from Mr. Barnes, which is quoted, refutes Mr. Hill, because the letter refers to "matters *we have talked of* with our St. Paul friends," showing, we think, that Mr. Barnes and Mr. Farley together held interviews with Kittson and Hill on the matter, which, by the introduction of Mr. Farley's letter to Mr. Barnes of June 3, 1876 (1,492 Deft.'s Ex. 139), is now clearly shown to be nothing more nor less than the negotiation for the bonds of both companies, and that Mr. Farley was urging the matter upon Mr. Barnes' attention in Mr. Kittson's behalf—Mr. Hill's name not being mentioned in Mr. Farley's letter.

On cross-examination as to these conversations with Mr. Barnes when in St. Paul in March and April 1876, Mr. Hill admits that the cut-off matters may have been discussed with Mr. Barnes. (782, C. Q. 558, 560.) Counsel for the defendants criticised, in his brief below, the testimony of Mr. Farley, and claimed that he could not have told the truth when he testified that the Cut-off matters were discussed with Mr. Barnes during that visit in the spring of 1876. The argument is based upon a theory that the condition of affairs was such at the time that the Cut-off project could not possibly have been discussed. But, as Mr. Hill has testified, "the matter of the construction of the Breckenridge-Barnes' link may have been mentioned during one of those interviews, or some of those interviews" (782, C. Q. 558), we shall not pursue the subject or make further reply to the attack upon Mr. Farley for having testified to the same effect, even though his testimony was more fully and positively given.

Mr. Hill's testimony substantially agrees with that of Mr.

Farley upon the point that Mr. Barnes would not entertain the proposition or request made to him to fix the price at which the bondholders would sell. (585, Q. 115.)

Mr. Hill says that about the time the agreement with Mr. Litchfield expired, about the middle of August, 1876, a telegram was sent to Mr. Barnes making inquiry. (587, Q. 121–3.) And subsequently, on taking the testimony of Mr. Nichols, in New York, at the time when Mr. Kennedy was too ill to attend (991), the telegram of August 16, 1876, was produced. (992, Deft.'s Ex. 44.) That telegram was addressed to Mr. Barnes, and is signed by Mr. Kittson alone. It reads as follows:

To Jno. S. Barnes, care J. S. Kennedy & Co. N. Y.

Will the bond holders' committee make an offer fixing the prices of each of the different classes of bonds controlled by them, upon which they will sell out entirely and let foreclosure be made here.

N. W. KITTSON.

The reply to that telegram copied on Kennedy & Co.'s letter-book, was also introduced at the same time, and was addressed to Mr. Kittson by Mr. Barnes on August 17, 1876. It reads as follows (957):

Augt. 17, 6.

N. W. Kittson, St. Paul, Minn.:

Have written Farley on the subject to-day.

J. S. BARNES.

But the letter referred to in the telegram could not be found upon the letter-books of Kennedy & Co., and the complainant did not have it among his letters. The counsel for the defendants, however, stated that he learned it had been copied in a private letter-book of Mr. Barnes', "which Mr. Barnes would not permit the defendant to see or take a copy of it." (1,693, top of page.)

Mr. Hill says he made a journey east to the Centennial, etc.,

in October, 1876, starting the 6th or 7th, and returning about the 25th of that month. (592, Q. 146-7.)

Mr. Hill testified also, "at the time Mr. Carp was expected here, I think Mr. Farley informed me that he was coming." (687, top of page.)

(2.) The Carp negotiation.—Mr. Hill testified, that after the sending of the telegram to Mr. Barnes, in August, 1876, the "next active negotiations were with Mr. Carp,—the agent of the bondholders,—on his arrival in St. Paul, late in 1876." (593, Q. 144.) He further says: "I do not remember when I was introduced to Mr. Carp, but I think it was likely Mr. Farley did." (593, Q. 152.)

Mr. Hill states the interviews with Mr. Carp,—that Mr. Carp seemed to be somewhat incredulous as to their ability to raise money enough to buy the bonds;—that Mr. Carp explained that the committee had no authority to sell the bonds, but was anxious that an offer should be made substantially on a basis Mr. Carp outlined (593-4, Q. 154);—that subsequently to these interviews Mr. Carp went to New York and an offer was mailed to him there, which offer Mr. Hill identified in the deposition of Mr. Carp as the proposition of January 29, 1877. (594, Q. 155; Carp's Depn., 529.)

Mr. Hill denies that in the making up of the proposition Mr. Farley was consulted (594, Q. 157), and on cross-examination denied that the facts and data contained therein, and particularly as to the lands unsold, etc., were obtained from Mr. Farley. (811, 812, C. Q. 683 to 689.) And on the cross-examination, being asked what Mr. Farley's attitude was toward himself and Mr. Kittson at that time, when Mr. Carp was here, or the proposition was being made, he replied:

"I do not recollect anything at the time why I should have considered them friendly or unfriendly. * * * It is diffi-

cult for me to say what estimate we placed on Mr. Farley's friendship on that date or otherwise." (811, C. Q. 681, 682.)

Mr. Carp, on the other hand, in his deposition gives a version of the interviews, and Mr. Farley's attitude toward Kittson and Hill, as follows:

"I know Messrs. Norman W. Kittson and James J. Hill. I made first the acquaintance of Mr. Hill. Mr. Farley introduced me to him a morning in December, 1876, at the depot of the railroad. To Mr. Kittson, Mr. Jesse P. Farley introduced me afterwards, as being the person who wanted to buy the bonds which were under the control of the Dutch Committee.

The several complications and litigation about the affairs of the said railroad companies had caused a heavy depression on all the classes of bonds of the said railroad companies, the owners were very anxious that matters should come to a result, and the committee, who, under these circumstances, was unable to raise the means to finish the roads, pressed upon me to try to obtain some compromise with the different parties. It was a most difficult position, and I talked many times about all these questions with Mr. Jesse P. Farley who related to me the various difficulties we were to meet from competing railroads and opposite parties urging strongly upon the necessity to finish the building of the roads, which at that time was almost impossibe for the committee to do. I was induced to believe that it would last many years before all these troubles should come to an end. Under these circumstances I felt inclined to entertain a proposition to sell the bonds which were under the control of the Dutch Committee, and upon Mr. Farley's question if the Dutch Committee would be willing to sell these bonds, I replied that I believed people in Holland would be willing to sell out if a reasonable and fair bid could be obtained. Mr. Farley said such people, who would buy the bonds, could be found in Minnesota, *which I doubted, however*, but sometime afterwards he said he could introduce me to men who would buy the bonds, and so he introduced me to Messrs. Norman W. Kittson and James J. Hill. I believe Mr. Jesse P. Farley was present for a while at the first interview, but afterwards I had an interview with said gentlemen at the office of Mr. Norman W. Kittson. It was Mr. Farley who brought me in at said office, as I ignored where it was.

"In these interviews I stated several times that the committee had no authority to sell the bonds without the assent the certificate holders. The committee could only advise, but such advice was almost certain to be followed. I further stated that I was not authorized to name any price for these bonds; that they certainly could not be bought at their quotation at the Exchange of Amsterdam, this quotation being merely a nominal price for a few bonds, but if they would name me a price, and I thought this price was reasonable and fair, I would lay the matter before the committee.

"I had, however, no confidence in their proposals, and told so to Mr. Jesse P. Farley *who persuaded me that Mr. Kittson was a man of high reputation in the state and of much influence* having close connections with strong financial men in Canada. Upon Mr. Farley's *repeated assurances* that these gentlemen should be able to fulfill their enagements, I got more confidence and looked more seriously upon the matter."

As already shown by Mr. Farley's testimony, his consultations with Kittson and Hill as to all the details of this matter while Mr. Carp was here were frequent, and his assistance to them in every way, was upon the most friendly basis, in fact upon the basis of his being interested with them as an equal associate. On being called as a witness for the defendants Mr. Farley was asked what services and what co-operation on his part were "indispensable" to the success of the enterprise (1415 Q. 289); and this cross-examination was pursued to considerable length. (1415–19.) Mr. Farley answered:

A. There was so much talk and so many interviews, that it would be practically out of my power to name the times and places and what was said, but as I look at it now and did then, that after Mr. Hill and Mr. Kittson was introduced to John Carp on the subject, I do not believe that John Carp would have ever entertained the subject for a moment, if it hadn't been for me—not one moment. That was my opinion then and it is my opinion now. But I urged upon him—he talked to me a great deal about it—*I urged upon him the fact that Mr. Kittson was a man of integrity and business qualifications,*

and he had assured me that the money could be raised and I believed every word of it and urged upon him the necessity of entertaining their proposition. (1,417.)

And Mr. Farley said that at the time of getting up the written proposition to Mr. Carp, there was a great deal of talk over it, and he got the information needed as to lands sold and unsold, from the land commissioner (1,431); and also that Mr. Kittson consulted him particularly as to the value of the Extension Line bonds. (1,430).

Mr. Hill further said as to the negotiations with Mr. Carp: "* * * Mr. Carp was particular to say that he could not fix a price for the committee—he had no authority to do it; at the same time he could, informally, indicate prices, below which he thought the committee would not sell—or recommend their bondholders to sell." (595, Q. 165.)

After that proposition of January 29, 1877, had been sent to Mr. Carp in New York, Mr. Hill says: "I think the next step was a request from Mr. Smith for Mr. Kittson and myself to come to Montreal. It was early in May or the middle of May when we got ready to go." etc; and that he was then introduced to Mr. Stephen, *prior to which he had no acquaintance with Mr. Stephen.* (596.) But, as already shown, Mr. Stephen recollects the first visit by Mr. Hill to have been in March or at the close of the winter, while, as he says, he has a hazy recollection there was snow on the ground (1231, Q. 38.) If Mr. Stephen is right, Mr. Hill's visit to Montreal was probably brought about by reason of the suggestion made in the letter to Mr. Farley by Mr. Barnes, of February 6, 1877, in which it was suggested that the proposition to Mr. Carp required some guarantee by the Canadian capitalists, etc (277.)

It is probable that if the letter from Mr. Carp of February 28, 1877 (602, Q. 197), in reply to the proposition of January 29th, and the letter Mr. Kittson wrote to Mr. Smith from Chicago, and which Mr. Hill took with him to Montreal (596),

were produced by the defendants, they would throw light on the course of the negotiations at that time, and show still more clearly Mr. Farley's connection with the steps taken, than does the evidence to which we have referred.

The next events to which Mr. Hill alludes, in the course of his testimony under this head, are the making and sending of the offer to Mr. Carp on May 26, 1877 (600, Q. 190-1); his visit to New York in June, 1877 (604, Q. 209); telegrams and letters to and from Mr. Carp (605, Q. 218-19); and the correspondence and telegrams in the summer of 1877 (606-7).

(3.) The Carp negotiation, continued.—The proposition having been brought before the committee by Mr. Carp, it was, to a certain extent, taken up by Kennedy & Co. during the month of August, 1877, by sending letters and telegrams to Mr. Farley, asking that an interview be arranged between Smith, Stephen, Kittson and Hill, and Kennedy & Co. (609, Q. 241.)

After Mr. Smith and Mr. Stephen had visited St. Paul, and been taken over the road on September 1, 1877, by Mr. Farley, on the request of Mr. Kittson and Mr. Hill, communicated through Mr. Fisher, as Mr. Fisher says, late at night (and which is not denied by Mr. Hill), a visit was made to Montreal and a conference had with Mr. Barnes, resulting in a change of price on one class of bonds, and certain other changes in the pending proposition. (305.) The conduct of the negotiation, however, remained with the committee itself.

This conference with Mr. Barnes was followed by an understanding between Messrs. Stephen, Smith, Kittson and Hill, as to their shares in the enterprise, to which understanding we will direct attention under the next subject to be discussed.

Within a short time after the Montreal conference, Mr. Stephen sailed for Europe. (614, Q. 272.) It was expected

that he would be able to make a loan for the parties interested, on the security of the bonds to be purchased." (614, Q. 278.) Mr. Stephen did not secure the financial aid he expected in London because it was difficult to get capital to invest in so big a law suit. (615, Q. 280.)

Mr. Kennedy testified that the proposition by Kittson and Hill was accepted by the committee and the holders of the bonds some time in October or early in November, 1877. He said:

C. Q. 65 At what time, according to the best of your recollection, was the consent of the Dutch Committee and of the Dutch bondholders to the proposition of Kittson & Hill and their associates, obtained and made known to such associates?

A. As nearly as I can remember, I think it was sometime in October, but it may have been sometime early in November, 1877. (1621.)

Mr. Kennedy testified that the Dutch Committee, on Mr. Stephen's failure, etc., were disposed to hold him and his associates to their bargain, and intimated that legal proceedings would be taken to enforce the agreement. He testified:

The Dutch Committee did intimate that legal proceedings would be taken to enforce their supposed or alleged agreement. (1624.)

And Mr. Kennedy further testified that before re-opening the negotiations he consulted counsel in New York as to liability of Stephen and associates in the premises. He said:

"I did consult Mr. William H. Scott, of the firm of the Chapman, Scott and Crowell, of New York, who were at that time our counsel in regard to St. Paul and Pacific Railway matters, and after an examination of the so-called proposition of May 26, 1877, he advised us that neither the parties themselves making it nor any others associated with them, had, in his opinion, incurred any responsibility, whatever." (1648, R. D. Q., 29.)

(4.) The final negotiation. Mr. Hill testified that Mr. Stephen returned from England late in December, 1877, and he and Mr. Kittson with Mr. Galusha visited Montreal and New York "with a view of taking up the negotiations which had been suspended." (616). Mr. Hill further said:

"The Dutch Committee were apparently anxious that the negotiations should not end,— that they should be carried out in some way, as they had announced in Holland that the matter was closed with us,—that the bargain was closed; when in point of fact that bargain was not closed with us." (617, Q. 298.)

Mr. Hill testified that he, with Messrs. Stephen, Kittson and Galusha, arrived in New York from Montreal on January 2, 1878, in the morning, and the negotiations were taken up with J. S. Kennedy & Co. and the matter discussed during the day; that a proposal or memorandum was drafted and discussed the following day; that the matter was fully discussed for two or three days (618 Q. 301 and 305),—and that the outcome of the discussions resulted in an "offer that was to be cabled to the Dutch Commitee, and if approved, to be made public in Holland, by submitting it to the Dutch bondholders whom the committee represented." (619, Q. 306.)

And he further says an agreement between Stephen, Smith, Kittson and himself as to their respective interests in the enterprise was prepared the evening of the 5th of January, 1878, which matter we will also discuss under another head. (619, Q. 312.13.)

That proposition to the Dutch committee and the Dutch bondholders, after being submitted and published in Holland, as shown by the copy of the publication contained in Mr. Carp's deposition (539), was accepted by a majority of the bondholders, and was the basis of the agreement of twenty-seven articles signed on March 13, 1878, being for a sale of the

bonds; a copy of which agreement is attached to the answer of the defendants. (35–45.)

2. The dealings of the associates Kittson, Hill, Smith and Stephen with each other.

In Mr. Hill's testimony as to the conversation with Mr. Smith at Ottawa, in March, 1876, he said, as to the interests in the proposed venture: "It was understood that if the bonds were bought, or the property secured, we (that is, Mr. Smith, Mr. Kittson and myself), would all make some money out of it." (587, top of page.) And that is the first date at which Mr. Hill testifies the subject of a division of interests was mentioned.

At the visit to Montreal, made in May, 1877, just before the written proposition of May 26th was sent to Mr. Carp, according to Mr. Hill,—but which was made in the late winter of 1877, while there was snow on the ground, according to Mr. Stephen,—nothing was said as to a division of interests. Indeed, Mr. Kittson was not present at the time, having sent by Mr. Hill a letter to Mr. Smith, as he was detained by illness in Chicago. (596, top of page.) Mr. Hill explained matters, and Mr. Stephen thought he could interest some English parties and be able to negotiate a loan on the security of the bonds, pending the foreclosures. (597, Q. 171–5.) Mr. Farley's testimony was criticized by the defendants' counsel in the court below, and the truthfulness of his claim impugned, on the ground that Mr. Farley, as it was alleged, could not have told the truth in stating what Mr. Kittson said as to how the money was to be raised to buy the bonds. As to this point, it is to be observed that Mr. Farley did not state that Mr. Kittson told him that the Bank of Montreal would lend the money,—Mr. Farley's statement was that Mr. Kittson said "he was satisfied that he could raise the money through Mr.

Donald A. Smith of the Montreal Bank." (72.) It is also to be observed that Mr. Fisher testified in stating what Mr. Kittson said of Mr. Smith: "I think he said he was a Director in the Bank of Montreal,"—that is, that Mr. Smith was a Director in the Bank of Montreal (345);—and it is nowhere denied that Mr. Smith was such director. And it is further to be noticed that nowhere in his testimony does Mr. Hill say that the money was at any time expected to be raised by or through any other channel or means than such as Mr. Smith directed them to, viz.: Mr. Stephen, *who was President of the Bank of Montreal;* nor that any of the money was to be furnished by himself or Mr. Kittson, or that they were to be responsible in part for it, until the remark was made by Mr. Stephen at Montreal in September, 1877, that they "were all in the same boat, to sink or swim together," at which time it was understood their "respective interests and liabilities should be equally divided." (613, Q. 268.)

As Mr. Farley's testimony is not susceptible to the construction that he meant to testify, Mr. Kittson informed him the money was to be gotten from the vaults of the bank, but "through Mr. Donald A. Smith of the Montreal Bank," we insist the evidence bears Mr. Farley out in his statement.

All these remarks apply simply to what was said or expected in the spring of 1876, and stated by Mr. Kittson or Mr. Hill at that time to Mr. Fisher or Mr. Farley, as to whence the money was expected to be derived. But as a matter of fact in the end, when Stephen's attempted loan in England had failed, and money was being put up in New York, and Kittson and Hill were being called on *to join in promissory notes to secure it*, and for such collaterals as they had, Mr. Stephen's letter of February 10, 1878, shows the money and advances did, after all, come from the Bank of Montreal. (920, Deft.'s Ex. 20.)

Following the conference with Mr. Barnes, of Kennedy & Co., in September, 1877, at Montreal, and during that visit,

a meeting was held at which a division of interests was alluded to between Smith, Stephen, Kittson and Hill. On this occasion also Mr. Hill says Mr. Stephen expected, as he had in the previous spring, that he would be able to make a loan on the security of the bonds. (614, Q. 278.)

Mr. Hill's statement of what was then said as to the relations and interests of the parties in the enterprise, is as follows:

A. It was discussed between us four. The probability of interesting parties in England in the enterprise was also discussed, and it was concluded and understood by us that our respective interests between ourselves, and our respective liabilities, should be equally divided; as Mr. Stephen expressed it, "we were all in the same boat, to sink or swim together."

269 Q. What, if anything, was said between you gentlemen at this time, in regard to the reservation and use of any interest in the enterprise to be used to aid you in financiering it, and if any fraction was mentioned, please state what that was, and how it was to be used.

Same objection as last above.

A. At that time it was understood that Mr. Stephen should be at liberty to do what he deemed best in the interests of all in the matter of interesting people in England in the enterprise.

170 Q. Was anything said as to any particular portion or fraction of the whole he might find it necessary or desirable to use for that purpose?

Same objection as last above.

A. I do not remember any amount or proportion of the whole being fixed at that time. (613.)

It thus appears that even at that late date no written agreement whatever had been made between the associates other than Mr. Farley, as to a division of their shares in the expected profits of the venture. No such written agreement was made until after Mr. Stephen had been to Europe, failed to raise the money, and returned and renewed the negotiation with Kennedy & Co. in New York in January, 1878, to which occurrences we will hereafter more fully

refer. But we will at this point call attention to a statement in the newspaper article which Mr. Farley says he thinks was the premature publication of which Mr. Kittson complained to him, being the article in the "Pioneer Press," of October 26, 1877 (when it was supposed the negotiation had been consummated, though, in fact, it was not).

In that article it is stated:

"* * * Under agreements made between St. Paul and Canada parties, we understand that when the property is cleared of existing incumbrances, new stock is to be issued, sixty per cent. of which will be held by Messrs. Kittson & Hill, of St. Paul, and the remainder of the Canadians, while new bonds are to be issued to the Canadian parties for an amount sufficient to cover the cost by the purchase and the cost of completing the St. Vincent extension north of Crookston, and from Melrose to Alexandria." (1,435.)

In this article, which Mr. Kittson complained had been prematurely inspired by Mr. Hill (1,436-7), and which Mr. Farley testified he had nothing to do with, and did not know of until Mr. Kittson showed it to him (1,465, Q. 93), the interests to be retained at St. Paul by Kittson and Hill is stated to be sixty per cent. (or *three-fifths*); and the article was published about a month after the last mentioned Montreal conference, and about two months before the making of the draft of the agreement by the associates (other than Mr. Farley) in New York, January 5, 1878.

Mr. Hill never denied that he gave the information to the Pioneer Press that is contained in that article.

The last mentioned agreement for a division of interests was formulated and agreed upon on January 5, 1878, and bears date January 21, 1878. Mr. Hill testified to that effect as follows:

A. After the form of the proposition was settled and delivered to Kennedy & Co., an agreement was made between Mr. Stephen, Mr. Smith, Mr. Kittson and myself, covering our respective interests and liabilities in the enterprise.

Q. 313. Was that agreement subsequently reduced to writing?

A. It was; a memorandum of it was made that evening, I think, the evening of the 5th of January, and it was reduced to writing and executed a short time thereafter. (619.)

The written agreement for division of interests which is thus referred to, contains, among others, provisions as follows:

"Now, in case our said offer of purchase shall be accepted by said Dutch Committee, and said purchase concluded, it is understood and hereby agreed between us, that the interests acquired under said purchase and in said reorganized company, and the profits and losses accruing from said enterprise shall be held and borne by us in the following proportions, viz:

George Stephen	two-fifths (2-5)
Donald A. Smith	one-fifth (1-5)
Norman W. Kittson	one-fifth (1-5)
James J. Hill	one-fifth (1-5)

It being, however, understood and agreed that one-half of the said two-fifths, so held by said George Stephen, as above, is held by him for the purposes of securing the co-operation of an associate or associates in said enterprise through whom the financial aid necessary to enable us to complete such purchase may be obtained as understood between us in New York at the time of making our said offer of purchase." (915-16.)

We think we will be able to show to the court that from and after the making of that agreement, Mr. Hill with the assistance of those who signed the agreement with him, commenced to treat Mr. Farley, and did thereafter treat him, upon a different footing and by a method of circumvention and duplicity which was well calculated to deceive Mr. Farley and lull him into a fancied security. Also that this was done with the object and view of retaining his co-operation, assistance and advice, but with the design that in the end he should be dropped upon the pretext that being a receiver he could not lawfully have or retain an interest in the enterprise upon which he had been so long engaged with Kittson and Hill.

From this time on, the documentary evidence, taken together with the admissions by Mr. Hill and Mr. Stephen go far

to demonstrate what we claim. This matter, however, we will more fully discuss when we come to consider the relations of the associates with Mr. Farley.

Mr. Hill testified:

"A. I think we left New York the evening of the day upon which the negotiations were completed and the offer cabled to the committee in Holland." (622, Q. 329.)

He further testified as to what he regarded as the risks and liabilities undertaken in the purchase of the bonds, and as to the outlays made, and notes and securities put up by Mr. Kittson and himself in aid of the enterprise and to assist in its being carried out. (631–3.)

A subsequent agreement in writing was signed between Smith, Stephen, Kittson and Hill at Montreal on March 27, 1878, providing for the contingency of the death of any of the parties, and for their all joining in any obligations necessary to be undertaken, and for the reorganization of the property when foreclosed.

In case of the death of either party, however, the interest of the estate of the deceased in the enterprise, over and above the repayment of any advances and obligations was subject to purchase by the survivors at $75,000, in full. (1,268, top of p. 1,270.)

In the course of the dealings of the associates among themselves Mr. Hill has testified to certain intentions and ideas which he, or himself and his associates (other than Mr. Farley), had in their dealings for the minority bonds and with Mr. Litchfield, which can have been imported into the record for no other purpose and with no other design than to raise in the mind of the court the belief or suspicion that some form of fraud or taint of moral turpitude, was inherent in the general transaction. To that testimony we will briefly allude.

Mr. Hill's attention was called to article 16 of the agree-

ment for the purchase of the bonds, which provided substantially as follows:

XVI. For the purpose of use in exchange for lands only, the purchasers may withdraw bonds from the hands of the trustees, on paying cash (at purchase price), therefor; drawn to 60 per cent. of the total of each bond issue;—without, however, affecting the options of the certificate holders. (40-41.)

Mr. Hill testified as to what *his own purpose was* in obtaining the adoption of that provision in the agreement. He stated his object, the gist of which was that he wished to have the privilege of supplying the market demand for bonds in St. Paul to be exchanged for lands, there being a considerable demand for them; that a lower price than the current price on some of the bonds, was made; and that "the syndicate, or pool, or trust, was broken up and went out of the market." (628, Q. 363.) And also that the object was to secure the bonds as low as possible. (628.) That there was a syndicate in St. Paul dealing in those bonds, with which Mr. Upham was connected, and that he persuaded Mr. Upham to drop the syndicate and sell the bonds of the associates (628); and that the effect of this was to destroy the demand for these bonds at Amsterdam at the price at which they had previously been sold, "you might say the effect was to depreciate the value of the bonds in Amsterdam." And also that he and his associates availed themselves of that depreciation by purchasing additional bonds in Amsterdam to quite a large extent. (629.)

We are unable to see how, if it was lawful for the bonds to be exchanged for lands of the company, and if it was lawful to buy and sell bonds as between individuals, the article in the agreement of March 13, 1878, above set forth, could be unlawful; nor how the exercising of the privilege which that article gave to the purchasers could be unlawful or fraudulent. If one class of bondholders desire to sell at a price lower than another class, we are unable to see how that could be fraudulent in any

point of view. There was nothing in the transaction as stated by Mr. Hill, which would prevent any holders of bonds from having their bonds exchanged for lands according to the terms of the mortgage securing them; and it was only for the purpose of exchange for lands that the bonds were permitted to be withdrawn, by the clause referred to. And Mr. Hill does not state at what time he and his associates availed themselves of the depreciation by purchasing additional bonds in Holland, nor to what extent they did so, except that it was to "quite a large extent." (629.) He does not say whether it was to the extent of $1, or $100. It is merely an insinuation not accompanied by any allegation in the answer, nor sustained by any definite figures, circumstances or data, nor by any statement of who the individuals were of whom the bonds were purchased, or whether money or stock in the new company was given for such purposes.

To the same effect is the testimony of Mr. Hill concerning the statement in the letter to Mr. Carp, of July 31, 1877, signed by Mr. Kittson and Mr. Hill, in which it is said: "We desire the privilege of purchasing the bonds in excess of amount named should we be so advised, through our own agencies," etc. (534), the desire being to purchase minority bonds at much lower prices (629), and the expectation being to make the market as desired. (630.)

Again we remark that even if this be taken as a statement of a desire or expectation of doing something oppressive and fraudulent in its character, it is not followed up by a statement that it was done or carried out in the manner desired or expected. In the absence of such definite proof, the statement amounts to nothing.

Mr. Hill also testified that a suit was brought in the early summer of 1878, by attachment, against the property of Mr. Litchfield, alleging the conversion to his own use of money which had been furnished to complete the main line. The

object being to show Mr. Litchfield that it was proposed to go for everything he had, and that it would make the settlement easier to arrive at with him.

That suit, it seems, was brought upon the advice of the counsel who defended this suit, in the court below, and who ventured to make the charge of blackmail against not only the complainant in this suit, but against his counsel who came into this suit after it was appealed to the Supreme court, and, of course, long after the bill had been prepared and signed by eminent counsel.

However, as to the suit against Mr. Litchfield, advised by counsel, in which it was proposed to go for everything Mr. Litchfield had, the statement that it was a suit by attachment, and for a wrongful conversion of money would seem to take the proceeding out of the catagory of fraudulent dealings,—if that was the object in introducing the evidence as to the suit, and to the purpose for which it was brought.

We cannot believe the suit in question was a malicious prosecution under the advice of counsel, and hence we are unable to see that it has anything to do with the issues in this suit. (647, Q. 555.)

To the same effect again is the testimony by Mr. Hill in explanation of the statements in the letter from Mr. Stephen, as to making up the loss on the purchase of the Litchfield stock, out of the outstanding bonds and certificates. (678 Q. 571.) There is no evidence that that was done. The price at which said outstanding certificates were bought, to what extent they were bought, and when or from whom, is not shown by the record. There is no data by which to go, in taking up the *insinuation of fraud*,—(if that is the object in bringing the matter into the record).

Finally, on the question of any possible fraudulent dealings or *intentions*, as disclosed by Mr. Hill's testimony, we will notice

(as the only subject of the kind he touched upon, aside from what we have already discussed), the testimony with which Mr. Hill closed his long direct examination,—preserving, as it were, the fitness of things to the very end.

He testified that when Mr. Carp was here (a stranger in a strange land,) during the session of the legislature in the winter of 1877, there was some legislation being advocated for the forfeiture of the Brainerd Branch (which was the Delano Scheme),—and that he, Mr. Hill, saw some members of the legislature and asked them to go on with the fight, and that he asked one member in particular to go on with the fight he was making. Mr. Hill says he told that member if there was any way in which he could help him to let him know; and says "he did make a fight that was successful." (698, Q. 641.) Mr. Hill, on the question as to what his purpose was in having the conversation with the member of the legislature stated:

A. Mr. Carp, when here, was very much alarmed at the course of the legislature, and afraid the property or security would be impaired by the action of the legislature. I thought in dealing for the bonds that the action of the legislature, looking towards a forfeiture of the Brainerd Branch, would incline him to sell the bonds at a lower price. The Brainerd Branch from Sauk Rapids to Brainerd, connected with the Northern Pacific at Brainerd, would be, if lost to the St. Paul and Pacific, of the least consequence of any part of its lines. (699.)

Mr. Hill, however, did not venture to say that the forfeiture bill would not have been passed but for his talk with the member; nor that he was ever called upon to do or did anything in the matter, except to hold the conversation in which he encouraged the fight against what was supposed to be the bondholders' interests Mr. Carp was in St. Paul representing. The fact that Mr. Hill found it in his heart to desire, and that he tried to raise the already great apprehension existing in Mr. Carp's mind, lest the bondholders should suffer through

action in the legislature, is all that Mr. Hill's avowal tends to prove—and it is for the court to determine whether such an avowal of methods and practices strengthens Mr. Hill's position generally on the facts of this case.

3. Dealings of Mr. Hill and the associates with Mr. Farley after January 5, 1878.

1. During the months of August, September and October, 1877, while the negotiations and correspondence were going on with the Dutch Committee, Kennedy & Co. sent cipher dispatches intended for Kittson and Hill to Mr. Farley a great number of which dispatches are contained in the record; some of them are translated and some are not. (323–8.) But, in January, 1878, as soon as the proposition to the committee had been settled upon and sent off, and the agreement was made between the associates Smith, Stephen, Kittson and Hill, giving each a one-fifth interest, except Stephen, who held an extra one-fifth to obtain other associates if necessary, Mr. Hill was furnished with a copy of the cipher code, and no more such dispatches were sent to Mr. Farley. Mr. Hill testified, on being shown a letter from Kennedy & Co. of January 25, 1878: "Within a short time after the date of that letter, Kennedy & Co. furnished Mr. Kittson and myself —probably sent it to me with a copy of their cipher code." (610, Q. 253.)

And he says that after he received that code no more communications from Kennedy & Co. in cipher were received through the medium of Mr. Farley, so far as he recollects. (611, Q. 254.)

Mr. Hill states that Mr. Kittson once told him that he, Kittson, after their return from New York, in January, 1878, had some conversation with Mr. Farley in which "the matter of Mr. Farley taking a small interest in the enterprise was mentioned;" that he, Mr. Hill, was

not present at the interview (626, Q. 350); but on cross-examination he further stated that Mr. Kittson characterized that interview with Mr. Farley as "chaff" or that he was "chaffing" with Mr. Farley. (819, C. Q. 719.) This testimony by Mr. Hill, besides being hearsay, *and an evident attempt to get before the court testimony Mr. Kittson could not be induced to give*, is by Mr. Farley positively denied to be true in point of fact, and Mr. Farley says Mr. Kittson was not a chaffing man. (1,669.)

Mr. Hill further states, on the question as to how it was expected the agreement to buy the bonds, etc., should be carried into effect: "At the time of making the proposition that matter was carefully considered by Kennedy & Co. and ourselves," etc. (644, top of page); and that thereafter in March, 1878, when the agreement was signed, Kennedy & Co. were asked to write to the receiver, Mr. Farley, to cooperate in the matter fully, etc.; and that Mr. Kennedy wrote one or more letters on the subject to Mr. Farley. (644, Q. 433.)

It appears further that Mr. Kennedy at once began to write Mr. Farley urgent letters in favor of the syndicate, beginning with the letter of April 4, 1878 (998), which contained a reference to Mr. Farley's interest in the matter, in language well calculated to deceive him. The letter stated among other things:

"Mr. Stephen was here this week and told me that both Kittson and Hill had spoken of you *in the very highest terms* and showed the most kindly feeling towards you, and that he and they wanted you to remain and aid them in completing the lines this year *and intimated very plainly that they both could and would make it worth your while to do so.*"

The words, "intimated *very plainly*," are quite significant coming from Mr. Kennedy, and being what Mr. Stephen had said to him, especially as there is no evidence that Mr. Farley knew Mr. Stephen inspired the letter, or that it was not a

frank expression from the agents of the bondholders, made on their own motion, entirely free from outside influence; and as nothing had transpired (except it be this letter) to arouse Mr. Farley's suspicions.

The letter of April 4, 1878, contained the further expressions:

"I presume you have seen Messrs. Kittson & Hill since their return to St. Paul and learned from them how matters now stand between them and the Dutch Committee. They are now the virtual owners of the property and with their friends in Canada must go on and complete it as early as possible, and as this is quite as much for the interest of the Dutch Bondholders whom we continue to represent as for Kittson & Hill and their associates *we hope you will do everything in your power to aid them.* * * *

* * * "They wish to press on and complete the entire lines to St. Vincent and Fergus Falls at the earliest possible moment, and their intention is to raise the funds for doing so through the medium of Receivers Certificates at 8 pr ct. *You will require to get a modified order from Judge Dillon to do this*, which he will no doubt grant you, and I think that is the best and indeed the only way to do it in present circumstances. I have told Mr. Stephen they have a good thing if they will arrange carefully and economically, but if they do not husband their resources, they may fritter all their profits away. I also advised him not to allow statements to be made in the newspapers, such as have appeared lately, but to keep their own counsel and say nothing about their bargain and what they expect to make out of it. Mr. Stephen has acted on these suggestions and has written them fully on the subject, and if they give you the opportunity I wish you would give them the same advice."

Letters of the same character as that of April 4, 1878, were from that time forward frequently written to Mr. Farley by Kennedy & Co. Yet there is evidence in the record that there was not the least occasion for them. Mr. Hill sought numerous pretexts for having them written, but without reason or justice. Indeed, on the day that first letter was written, the things therein asked to be done were being done by Mr. Far-

ley in St. Paul—before the letter could possibly reach him. Substantially the things requested in the letter were embodied in a petition to the court, signed on April 4, 1878, by Mr. Farley, by his attorney, who deposed that the same was done by direction of the receiver. (1,557.)

When Mr. Kennedy was cross-examined, the whole of that letter was read to him, and he said:

C. Q. 80. Did you intend in that letter, just read, to embody and communicate Mr. Stephen's views so far as relates to Messrs. Kittson, Hill and Stephen and associates; or was the letter upon your own motion and for reasons and with motives originating with yourself?

A. To the best of my recollection I was expressing substantially the views which Mr. Stephen had conveyed to me and which he asked me to communicate to Mr. Farley. (1,626.)

And Mr. Kennedy further testified as to the motive or cause of writing that letter, and as to any knowledge on his part that Mr. Farley was not in harmony with the associates, as follows:

C. Q. 86. Had anything arisen up to April 4, 1878, which you can now state, and which showed, either to you or Mr. Stephen, that Mr. Farley did not reciprocate the kindly feelings Messrs. Kittson and Hill or Mr. Stephen saw fit to express through Mr. Stephen to you concerning Mr. Farley; or that Mr. Farley would object to do in the interest of the syndicate whatever was right and reasonable; or which showed that Mr. Farley would hesitate to work in harmony with them,—that is, in harmony in every proper way, with Messrs. Stephen, Smith, Kittson and Hill, in carrying out their said enterprise?

Answer. I do not remember anything of the kind, but I have an impression that prior to that time, Mr. Farley had either spoken to me, and I communicated it to them, or he had spoken to them and they communicated it to me that he had a desire to leave, and return to Dubuque, and they were desirous that he should remain until the new company was organized, *but this is a mere impression.*

C. Q. 87. You mean, I suppose, you have no positive memory to that effect?

Answer. I do.

Mr. Stephen testified as to what steps were taken after the agreement was signed with the Dutch Committee the end of March or early in April, 1878, to insure Mr. Farley's co-operation. He said:

"I had come to understand that Mr. Farley and Mr. Kennedy were very old friends, and I usually got my wishes and views communicated to Mr. Farley through John S. Kennedy." (1,242, Q. 105.)

And this statement is followed by his admitting he caused the letter of April 4, 1878, to be sent to Mr. Farley by Mr. Kennedy as "substantially his views communicated to Mr. Farley through Mr. Kennedy." (1,242.) Mr. Stephen also admitted having procured Mr. Kennedy to write to Mr. Farley the letters of June 10 and July 10, 1878 (1,243-4 Defts. Ex. 57 and 58, p. 999, 1,000); also the letter of February 15, 1879. (1,258, Compts. Ex. 167, p. 320.)

That evidence tends strongly to the belief that Mr. Farley was in good faith acting in harmony with the associates just as he had begun to do in the spring of 1876, and had been doing up to January, 1878, and, in fact, did throughout the entire transaction— *and that on the contrary, the associates were not treating him with candor.* Indeed, the correspondence between Mr. Kennedy and J. S. Kennedy & Co. and Mr. Farley (at the time when Kennedy was writing letters at Stephen's dictation, the idea thereof, doubtless inspired by Mr. Hill) shows that Mr. Farley was proceeding upon the idea that he was interested, and further shows that he was encouraged in that idea by Kennedy's statement of what Kittson and Hill had said about him, *and by Kennedy's previous letter* stating that he was glad to hear that Kittson and Hill had offered him an interest with them, *and also by the letter of the firm* of Kennedy & Company, stating that they would have great confidence in the enterprise if Mr. Farley continued his connection with it. The two letters to which we refer in this connection are the two replies to Mr. Farley's letter of Febru-

ary 22, 1878,—one written in Mr. Kennedy's handwriting and signed by him on February 25, 1878, and the other in Mr. Barnes' handwriting and signed J. S. Kennedy & Company, on February 27, 1878. In the first reply, Mr. Kennedy said:

"DEAR SIR: We are in receipt of your favor of 22d inst., and will send you the particu'ars you desire with pleasure, but two of our clerks are away sick, so that we are shorthanded, and we will have to ask you to excuse us till to-morrow or next day. We think it will pay you to take an interest with K. & H., and we are glad to hear that they have offered it to you. * * *" (317.)

In the second reply, which Mr. Barnes wrote, he gave the figures Mr. Farley had requested in his letter of the 22d, and which Mr. Kennedy said in his letter would be sent with pleasure in a day or two, and closed as follows:

"We believe these figures will cover your inquiry. We shall have great confidence in the future success of the enterprise if you continue your connection with it.

It must be a great relief to you to have Mr. Hill to attend to legislative matters. We regard him & his associates now as the real parties in interest." (994.)

Positive evidence exists in the record over Mr. Hill's signature that he was the moving or instigating party in procuring Mr. Stephen to influence Mr. Farley through Kennedy & Company. On June 7, 1878, Mr. Hill in writing from St. Paul to Mr. Stephen about various matters used the following language:

"In order to get the lease in time to be of service for the fall business, we wish you would, if you approve the plan, *put Mr. Kennedy in communication with Mr. Farley on this subject.*" (1,306.)

And that the court may see that the conclusions we have reached on the proofs with reference to Mr. Hill's being the instigator of this mode of treatment of Mr. Farley, are entirely correct, we here insert a copy of the 14th head or chapter given in the printed table of contents of the Defendants' Exhibits as prepared by defendants' counsel, a copy of which was

furnished to the court below as well as to ourselves. The matter referred to is as follows:

XVI. TABLE OF CONTENTS AND INDEX.

XIV. Letters showing Mr. Hill's views as to Mr. Farley's relation to the enterprise, and showing the means used by Mr. Hill to influence him through J. S. Kennedy & Co.

No. 121, Aug. 23, 1877. J. J. Hill to Geo. Stephen.
56, Apl. 4, 1878. John S. Kennedy to J. P. Farley.
48, May 25, " J. P. Farley to Judge Dillon. (Telegram.)
128, June 7, " J. J. Hill & N. W. Kittson to Geo. Stephen.
102, " 10, " Geo. Stephen to J. S. Kennedy & Co. (Telegram.)
50, " 10, " J. S. Kennedy & Co. to J. P. Farley. (Telegram.)
57, " 10, " John S. Kennedy to J. P. Farley.
146, July 8, " J. S. Kennedy & Co. to "
58, " 10, " John S. Kennedy to "
104&130, " 22, " J. J. Hill to Geo. Stephen.
103, " 25, " Geo. Stephen to J. S. Kennedy & Co.
106, " 23, " J. J. Hill to Geo. Stephen.
105, " 26, " Geo. Stephen to J. S. Kennedy & Co.
27, " 26, " " " " to J. J. Hill.
60, " 27, " John S. Kennedy to J. P. Farley.
107, Aug. 30, " J. J. Hill to Geo. Stephen.
106, Sept. 3, " Geo. Stephen to J. S. Kennedy & Co.
29, " 10, " " " to J. J. Hill.
109, " 10, " " " to J. S. Kennedy & Co.
32, Dec. 24, " " " to "
31, " 24, " Geo. Stephen to J. J. Hill.
131, " 26, " J. J. Hill to Geo. Stephen.
33, " 30, " Geo. Stephen to J. J. Hill.
132, " 29, " J. J. Hill to Geo. Stephen.
34, Jan. 3, 1879. Geo. Stephen to J. J. Hill.
35, " 4, " " " to "
147, " 4, " " " to J. P. Farley.
114, Feb. 12, " " " to J. S. Kennedy & Co.
C. 167, " 15, " J. S. Kennedy & Co. to J. P. Farley.
55, " 17, " John S. Barnes to J. J. Hill.

Towards the close of Mr. Hill's deposition he set up a number of claims, all substantially to the effect that Mr. Farley was not in harmony with the associates in carrying out the enterprise, after the bonds had been purchased. But each of those claims is met by a complete answer on the proofs.

(1.) Mr. Hill sets forth that Mr. Farley made objections to the recommendation of the commissioners, Gen. Henderson and Gov. Reynolds, who were appointed by the court to report on the matter of issuing debentures for the completion of the lines, and that though the court was disposed to act on the recommendation of the commissioners to issue debentures by sections of completed road, Mr. Farley influenced the court not to do so. (646–7, Q. 441.) Mr. Farley denies that any such thing occurred. (1,668.) Mr. Hill says Mr. Farley went with him to New York to there confer upon the matter. And it appears that Mr. Farley was in attendance before the court immediately after the contract was signed for the purchase of the bonds,—first at Jefferson City, second at Des Moines and third at Davenport, in addition to visiting New York. Mr. Farley says that the court insisted upon iron-clad provisions which made those trips necessary. (104–5, Q. 261–4.) Mr. Farley denies that he stood in the way in the matter. (1,668.) The admitted facts showing that Mr. Farley was on hand at once when needed, and that he made the visits spoken of, in company with Mr. Hill, would seem to render the position Mr. Hill takes nothing less than absurd. It is admitted the order was finally satisfactory and that Mr. Farley proceeded to carry it out.

(2.) Mr. Hill charges that Mr. Farley had to be influenced by Kennedy & Co. to let the contract for the completion of the roads, and that such contract was necessary because Mr. Farley was carrying on the work in a dilatory manner about July, 1878 (651, Q. 462–3), the inference being that this was because of Mr. Farley's lack of interest in the matter. As to

this, there is no doubt there were difficulties in the way of speedy work; but Mr. Farley did let the contract as was desired, after the proper order of the court had been obtained and the matter had been fully considered. Mr. Hill wrote a letter to Mr. Stephen as to the difficulties which caused slow construction, and that letter by Mr. Hill is better evidence as to Mr. Farley's alleged *attitude of unwillingness* than the oral statement given by Mr. Hill so long after the occurrences. The letter is dated July 22, 1878, and states, among other things (1,025-6):

"I have just returned from Sauk Center where I went to hurry the track laying, as they were not getting along as well as they should, *but I think it will be all right hereafter.*

I got Mr. Farley *to go up with me* and when on the ground showed him the trouble and to-day steps have been taken to remedy it. I began to fear we would not get to Sauk Center by Aug. 1st.

We had plenty of material but it was not being used fast enough.

I have had several talks with Mr. Farley in regard to contracts, lease, &c., and to-day *he showed me a letter* from J. S. K. dated the 10th inst., which *he had overlooked.*

This letter was right to the point and we have Galusha and Young making a draft of such papers as will cover the case, so that by to-morrow I hope to have these matters settled as far as the receiver is concerned."

That the contract which was desired was in the way of being settled satisfactorily, is further shown by the letter of Mr. Stephen to Mr. Hill on July 24, 1878, in which he says:

"I am in receipt of your message stating that the contract and lease will be satisfactorily settled, and that you are pushing the matter all you dare. I am sorry there should be any difficulty, especially as regards the contract for construction. I am writing to Mr. Kennedy to-day, and will get him *to stir up Mr. Farley.* It is a pity he did not run down and see Mr. K.; *he would have made him all right.*"

In Mr. Stephen's letter of July 30, 1878, he says:

"Mr. Kennedy is now as anxious as we are that Mr. Farley should make a contract with us for the construction." (935.)

From this it may be inferred that Mr. Kennedy was not disposed to approve of such contract until that time.

(3.) Mr. Hill claims that Mr. Farley, on the completion of the line to Pembina to a connection with the Canadian line from Ft. Garry to Pembina, made a through-rate tariff by agreement with the Canadian contractors, which materially impeded certain arrangements Mr. Stephen desired to make concerning the Canadian line, with the Canadian government. (655, Q. 478—and 660, Q. 501; 661, Q. 503.) Also that:

"It was a recognition by the receiver of the claim of these contractors to operate this road—this Pembina branch; and rate sheets were published and business started on that arrangement. It resulted in a long struggle, which I think continued through the winter and most of the following summer before the government got possession of the Pembina branch from the contractors." (661, Q. 503.)

Mr. Hill stated that he had induced one of the contractors, Mr. Willis, to join in this contract. (660, bottom of page.)

On rebuttal Mr. Farley testified that *Mr. Hill was the person* who first requested that the through rate should be made with the contractors. Mr. Farley said (1,668):

A. Mr. Hill was the first man that ever suggested that thing to me, and asked me to make it; it was done according to Mr. Hill's request.

Q. 13. Was that through-rate traffic arrangement last spoken of rescinded or countermanded by you, and if so, how long after you had made the arrangement was such rescinding or countermanding order given by you?

A. That through rate was rescinded a very short time after it was inaugurated, at the request made to me, I think, through Mr. Kennedy, but it was Mr. Stephen's wish that it should be so—should be rescinded. It was something that was annoying him in Canada—about leasing that line. I think I got my first information through Mr. Kennedy. It was unpleasant for Mr. Stephen, and he wanted it rescinded, and I done so as soon as I found that was the fact. (1668.)

Mr. Fisher testified on rebuttal to the same effect as follows:

Q. 4. Were you present at any conversation between Mr. Farley and Mr. Hill in which the matter of making a traffic arrangement with said last mentioned contractors was discussed, if so, please state what was said at such interview?

A. Yes, sir; I think I was, and I think Mr. Hill talked to me about it individually also. I do not know that I can state the conversation, but I know that *Mr. Hill was very anxious to have this rate made.*

Q. 5. Do you remember whether, subsequently to the making of such through rate, the same was rescinded by Mr. Farley?

A. Yes, sir; I cannot state how long that rate was in force but my recollection is, it was comparatively a short time.

As a surrebuttal of this testimony by Mr. Farley and Mr. Fisher, the contractor, Mr. H. B. Willis, was called by the defendants. Mr. Fisher had testified that Mr. Willis as well as Mr. Hill was anxious that the rate should be made. Mr. Willis testified that the only person he talked with on the subject was Mr. Alexander, and only asked him what they should charge for carrying goods from St. Vincent to St. Boniface. And then Mr. Willis proceeded to destroy his own testimony, and to contradict the testimony Mr. Hill had given. He said as to the through-rate "it could make no possible difference to the contractors whether he had a rate or not." Mr. Hill had testified that the making of that through-rate was a recognition by the receiver of the claim of these contractors to operate the road, and resulted in a long struggle which continued through the winter and most of the following summer, etc. But on the cross-examination Mr. Willis went much further by swearing point blank that there never was a through rate made at all! He said:

"I do not admit that there was ever any through rate made, sir. To my knowledge there never was such a rate." (1,702, C. Q. 1.)

And again:

"To my knowledge there never was any through rate made." (C. Q. 5.)

And to leave no doubt as to the meaning of his answer, he stated that he did not mean to be understood that he might have forgotten it, but "I did not know of it." (C. Q. 6.)

And this was one of the contractors with whom, as Mr. Hill testified, so much trouble was had growing out of the through rate, etc. He was willing to testify—but he did not know how to do it—he misapprehended what Mr. Hill wanted to prove by him and not only made a liar of himself, but of Mr. Hill also.

General Alexander, the general freight agent under Mr. Farley (afterwards Mr. Hill's general traffic manager), on the contrary, testified in corroboration of Mr. Farley by saying: "I think the matter was discussed. My recollection is there was some arrangement made." "I can't now say whether I first heard it from Mr. Fisher or Mr. Hill." Mr. Hill "objected to the arrangement and requested that it be rescinded. *I should say within two weeks.*" Whether Mr. Hill was absent during that two weeks he could not say. And, after that conversation with Mr. Hill, "Rates were quoted only to St. Vincent." (1,704-5.)

(4.) Mr. Hill claims that a long continued negotiation was had with the Northern Pacific Railroad interest, resulting in a protocol agreement for cessation of hostilities, and for a joint running arrangement over the branch line from Sauk Rapids to St. Paul, with passenger facilities at St. Paul; and that the Northern Pacific Company should refrain from building parallel roads, etc., etc. In these negotiations, which were difficult and prolonged, he says Mr. Farley gave no facts, information, advice or aid, and that he and the associates did not consult Mr. Farley with reference thereto further than his connection with the property as receiver called for. (641-643.)

On rebuttal Mr. Farley testified as to this matter and his connection with it, to the substantial effect that he was called upon freely by Mr. Hill, Mr. Stephen, and possibly Mr. Kennedy, and in corroboration of Mr. Farley's testimony on this subject, *a number of letters from Mr. Stephen to Mr. Farley* were introduced, being Exhibits 215 to 221. (1,708 to 1,712.) Also certain letters (from Mr. Farley's letter-book), to Mr. Stephen and Kennedy & Co., being Exhibits 223 to 238. (1,716 to 1,724.)

This correspondence shows that Mr. Farley was consulted on the matters in question. And in the letters of Kennedy & Co. to Mr. Farley of January 30th and February 15, 1879, (319–20), the matter of the Litchfield settlement and negotiation is spoken of in a way which shows that Mr. Farley had been freely consulted with upon that subject. In the letter of January 30, 1879, which is evidently an answer to Mr. Farley's letters of January 25th (not copied on his letter-book), it is said:

"As regards the compromise with the shareholders and a speedy foreclosure of the mortgages, I have very little faith in anything of the kind being accomplished," etc. (319.)

But the letter by Mr. Stephen to Mr. Hill of October 18, 1878, (937, Dfts. Ex. 30), would seem to leave no room for doubt on the subject of Mr. Farley's being consulted on the matter with the Northern Pacific Company. In that letter Mr. Stephen said:

"I note all you say in reference to your interview with Messrs. Mitchell & Merrill. I have your message of yesterday stating that Mr. Billings is favorable to peace. I shall do all I can to maintain it. I am to meet the N. P. Committee on Tuesday, and I propose taking Barnes or Kennedy with me. If I can settle upon the principle or basis of an agreement with them it is all I shall attempt. *The details I will leave to Mr. Farley and you.*" (937.)

In the cross-examination of Mr. Farley when he was first called as a witness, it was brought out that he had once called

on Mr. Hill at his house on Dayton's Bluff. Mr. Farley said.

"* * * I have been to Mr. Hill's house over here on the bluff on this very same business; called at his house to see him on this very same business. On Dayton's Bluff, I believe they call it." (146, Q. 155.)

Counsel, while so cross-examining Mr. Farley, was evidently ignorant of where Mr. Hill resided in the years 1876 to 1878, but Mr. Farley persisted in his statement that Mr. Hill did reside on Dayton's Bluff. (146, C. Q. 152–6.)

Mr. Hill, while denying the various conversations with him, testified to by Mr. Farley, was asked as to the matter of that visit to his house on Dayton's Bluff, and testified:

Q. 623. Question 155, and answer thereto of the cross-examination of Mr. Farley, are read to the witness, and he is asked if Mr. Farley called at his house, or where he lived on Dayton's Bluff, on any business, and if so, on what business, and how many times?

A. Mr. Farley called at my house on Dayton's Bluff one Sunday afternoon, and asked me if I would become his surety or bondsman in some suit where he had to give a bond. I think that I became his bondsman in the matter, he giving an indemnity bond to me.

Q. 624. State whether he called at your house on Dayton's Bluff on more than the occasion you have named, and about any other business?

A. He was there on one occasion only, as I recollect, and only upon the business that I have testified to.

Mr. Hill, however, testified that he signed only one bond for Mr. Farley, on which he received an indemnity (754, C. Q, 396): and that he moved to Dayton's Bluff in the month of October, 1875. (754, C. Q. 399.) The bond itself was produced and it bears date and was filed in court August 23, 1875. (771, Q. 497, Comp. Ex., 210, p. 947.)

Mr. Hill then testified as to the bond thus produced:

C. Q. 503. Is this bond which is now before you the one which Mr. Farley called to request you to give, at your house on Dayton's Bluff as you have already testified?

A. No, sir; the bond bearing date in August, 1875, could

not have been the one I testified to as his having called on me to get my signature, or to get my consent to becoming a surety, on Dayton's Bluff. I did not move to Dayton's Bluff until later than the date on that bond.

C. Q. 505. You mean to be understood that you might have been mistaken when you testified that the bond which he asked you to sign when he called at your house on Dayton's Bluff, was the bond which is now before you, if you did so testify in effect?

A. The bond before me was not signed at the time I lived on Dayton's Bluff, and his visit to Dayton's Bluff *must have had reference to another bond.* I was testifying to that matter from recollection. It is a long time since the matter occurred and I have not particularly charged my memory with it, nor have I any means of particularly refeshing my memory without looking up the bonds, which I have not done.

C. Q. 506. Was the bond which Mr. Farley called upon you on Dayton's Bluff to sign a bond against which Mr. Farley gave you indemnity?

A. *I do not remember.* He came there to ask me to go upon his bond. I am testifying as to the execution of the bond, from recollection. I am positive as to his coming to my house on Dayton's Bluff for the purpose of asking me to become his bondsman.

C. Q. 507. And whether it was a bond upon which you required indemnity, you are not now certain, if I understand you?

A. I do not swear to that matter as to a certainty, but from recollection.

But Mr. Hill had already testified on direct examination as already shown, that the bond about which Mr. Farley called at Dayton's Bluff was a bond on which Mr. Farley gave an indemnity. And no other bond was produced.

As there is no evidence in the record that Mr. Hill ever signed any other bond for Mr. Farley than the one so produced (either with or without an indemnity being given), Mr. Hill stands in the position of being contradicted by written evidence on a point upon which he attempted to make an explanation to get away from the force of material evidence, to wit: that Mr. Farley called at his house on the matters of

business pertaining to the joint enterprise, and of having that explanation exposed as being without foundation.

Counsel tried to find a refuge from this predicament by suggesting (brief below, p. 374) that the bond referred to in Mr. Farley's letter of December 21, 1875 (216), may have been the one as to which Mr. Farley called. But that letter shows that Mr. Scott (attorney from New York) called as to the matter requiring a bond on the 20th ("he called to see me yesterday"), and Mr. Farley's letter says:

"* * * It is a matter that has given me no small amount of anxiety, and I at once determined that the interest of the Dutch bondholders should not be jeopardized on account of their distance from the field of action, and want of friends in Minnesota, *and have today induced our friends here to agree to go upon a bond* which it may be necessary for the trustees to file here in bringing this suit to hold the iron." (216.)

But Mr. Hill has testified, as above quoted (Q. 623), "Mr. Farley called at my house on Dayton's bluff *one Sunday afternoon*, and asked me," etc. How a Sunday afternoon could come between December 20 and 21, 1875, is not pointed out. As a matter of fact, the calendar shows that the 20th fell upon Monday, and the 21st on Tuesday.

Mr. Farley testified that Mr. Kittson requested him to go to New York at the time when the settlement was to be closed with Mr. Litchfield for the purchase of Mr. Litchfield's stock. An attempt is made to contradict this testimony of Mr. Farley (and which Mr. Fisher corroborated), by the testimony of Mr. Hill that, as a matter of fact, a settlement with Litchfield had been made by Mr. Stephen in New York before the time it was generally known in St. Paul. To make this point good, Mr. Hill produced two letters from Mr. Stephen of January 17, 1879. (944.) One of these letters by Mr. Stephen was inclosed as a private letter in a separate envelope but under the same cover, and mailed within the other. (670-1, Q. 535

and 537.) One of the letters, the one not marked private, confirmed a telegram announcing the postponement of negotiations with Litchfield, and the paragraph of the letter so stating is as follows:

"My message announcing the postponement of negotiations must have disappointed *you and Mr. Kittson.* I am in hopes, however, that some arrangement will sooner or later be reached: meantime we must proceed as if nothing of the kind were even a possibility." (944.)

But in the inclosed private letter, it is said:

"The fact is I have settled with the old rat. * * * Now, not a word about a settlemen must be said and no one in St. Paul must know about it except, of course, Mr. Kittson, not even the lawyers." (944–5.)

Of this private letter containing the announcement that a settlement had been made with Mr. Litchfield, Mr. Hill said:

"It was shown by me to Mr. Kittson and to Mr. Galusha, —his attorney or representative." (672, Q. 542.)

It will be seen that the entire force of this evidence and the point attempted to be made upon it, under the circumstances shown by the correspondence, depends upon the correctness of Mr. Hill's statement that upon the receipt of the private inclosed letter, it was shown by him to Mr. Kittson and to Mr. Galusha, his attorney or representative,—and upon the further assumption that if that was done Mr. Kittson would not have desired that Mr. Farley should go to New York about the matter. Mr. Kittson's testimony not being taken to corroborate this statement, the testimony of Mr. Fisher and Mr. Farley that they had conversations with Mr. Kittson in which Mr. Kittson urged that Mr. Farley should go to New York in closing the settlement, is only met by Mr. Hill's unsupported word.

The question naturally arises, why should Mr. Stephen write on the same day two letters *to Mr. Hill* on the same

business, and in one of them reveal an important matter, and in the other letter tell a different story about it? Who was the person or who were the persons in St. Paul, who were to be kept ignorant of the fact of the settlement, but to whom Mr. Hill would naturally be expected to show the letters he received from Mr. Stephen on the matter of the Litchfield negotiation, which was known to be then in progress, so that it became desirable to write two letters on the same subject, mailing them under the same cover, both dated on the same day? Was Mr. Farley one of the parties? Was Mr. Kittson one of the parties? Who was to be shown the letter not marked private, saying:

"My message announcing the postponement of the negotiations must have disappointed *you and Mr. Kittson.* I am in hopes, however, that some arrangement will sooner or later be reached; meantime we must proceed as if nothing of the kind were even a possibility."

If it was *really intended* Mr. Kittson should see the inside letter, and if Mr. Farley had *no business to see it*, why the circumlocution—why the wheel within a wheel? It was evidently intended by Mr. Stephen to leave to Mr. Hill the discretion to either show the inside letter to Mr. Kittson or to keep it from him. Otherwise, there was no sense in writing two letters.

However, again we say that there is no force in this evidence as a contradiction of Mr. Farley, except the word of Mr. Hill that he showed the private inside letter to Mr. Kittson, on its receipt.

As Mr. Hill's statement was that he had, on its receipt, shown that private letter also to Mr. Galusha, we asked Mr. Galusha, on cross-examination, the direct question whether that statement was true. Mr. Galusha showed he had no recollection of such a letter, by testifying as follows:

C. Q. 82. I call your attention to Defendant's Exhibit No. 39, being a private letter by George Stephen to Mr. Hill, dated

January 17, 1879, which letter refers to Mr. Stephen's having arrived at a basis of settlement with Mr. Litchfield, and in which he uses these words: "The fact is, I have settled with the 'old rat' on the basis of $500,000 covering everything but Becker's charge for trustee." And I ask you if you know, of your own knowledge, whether the matters of fact, as stated by Mr. Stephen, relative to his settlement or agreement with Mr. Litchfield, were communicated to Mr. Kittson about January 17, 1879?

A. If Mr. Kittson was here at the time, the facts were undoubtedly communicated to him at that date. I am not quite certain whether he was here on that date or not, but the fact that the basis of $500,000 would be the price to be paid Mr. Litchfield was known to Mr. Kittson previous to that date.

C. Q. 83. *Previous to January 17, 1879?*

A. *Previous to January 17th, 1879.*

C. Q. 84. How are you able to make that statement?

A. Mr. Stephen I think was here shortly before the date of that letter arranging the terms of settlement with the Northern Pacific Railroad Company. Mr. Stark and one or two of the other members of that company were here, and the counsel, Col. Gray, I think was also here, though I am not quite certain about that. And after arranging or coming to an understanding with the Northern Pacific Company, a private meeting was had at which Mr. Stephen, Mr. Kittson, Mr. Hill, Mr. Otis I think and myself, were present, and in which it was stated that Mr. Stephen expected to be able to make that purchase for $500,000 and wanted the opinion of his associates as to whether the property was worth that amount of money. And it was agreed upon that if they could not get Mr. Litchfield's holding for a less amount than that, they had better pay it. *Whether Mr. Kittson was here at the date of this letter, I am not able to say.*

C. Q. 85. Whether he was here in St. Paul?

A. Whether he was here in St. Paul January 17th, 1879, I am not able to state. (1067–8.)

Mr. Galusha's testimony is a virtual corroboration of Mr. Farley and of Mr. Fisher, inasmuch as it shows that his remembrance was that a discussion of the amount to be paid Litchfield had been going on for some time; and Mr. Galusha's evidence is in square contradiction to that of Mr. Hill, because he

says that "the fact that the basis of $500,000 would be the price to be paid Mr. Litchfield was known to Mr. Kittson *previous to that date;*"—that is previous to January 17, 1879, the date of the private letter which announced the settlement for that sum. But the chief value of Mr. Galusha's testimony to the complainant consists in the fact that Mr. Galusha failed to corroborate Mr. Hill, or to remember the particular letter being shown to Mr. Kittson at the particular time stated by Mr. Hill,—or even to remember whether Mr. Kittson was in St. Paul at that time or not. As Mr. Galusha was of counsel in this cause in the court below, and was willing to testify at all, it is fair to presume that before his going on the stand this matter was sifted to the bottom, and his recollection,—or rather lack of recollection, was the cause for not asking him on his direct examination to corroborate the testimony counsel had been at so much pains to have Mr. Hill give when he was on the stand.

2. As the evidence referred to under this branch of the case, shows that only a general understanding was had as to a division of the interests as between Smith, Stephen, Kittson and Hill, and that that was first had orally at as late a date as September, 1877, and that the first written agreement was made in January, 1878, fixing each share at one-fifth, and leaving an extra one-fifth interest to be disposed of by Mr. Stephen, we will call attention to the only evidence in the record as to what was done with that extra one-fifth interest.

Mr. Kennedy was asked and he testified on the subject as follows:

C. Q. 17 Do you know what disposition George Stephen made of the extra one-fifth interest accorded to him in and by said written agreement last mentioned?

(Same objection as to first cross-interrogatory.)

A. No, I do not.

C. Q. 18. Do you know whether Mr. Stephen continued after you became a director of the defendant railway com-

pany, to hold two-fifths or about that amount of the stock in said defendant railway company?

(Objected to on the same ground as the objection to first cross-interrogatory.)

A. My recollection is that he did not hold any such amount, but that before the time referred to he had sold a large amount of his stock through me. (1609.)

Mr. Smith was also questioned on this subject. We ask the court's attention to the manner in which Mr. Smith testified as to the disposition of an entire one-fifth interest in the profits of the enterprise. In this extra one-fifth interest, after allowing for proper outlays or concessions Mr. Stephen might make to outside associates, under the written agreement of January, 1878, Mr. Smith was as much interested as any of the other associates including Mr. Stephen, who held it only as trustee, and that interest was equal to what Smith, Kittson, Hill or Stephen were, either of them, to have in the entire outcome of the venture. Yet, Mr. Smith testified concerning what became of that extra one-fifth share, as follows:

C. Q. 233. Ultimately, and upon the completion of your general project and the acquirement of the bonds, and the roads by foreclosure, were your several interests as between yourself, Sir George Stephen, Mr. Kittson and Mr. Hill equally divided?

A. We were each of us entirely satisfied with the interests apportioned to us, and accordingly released Mr. Stephen of all obligation in respect to his agency and transactions in the matter.

C. Q. 234. You refer, I suppose, by your last answer to the extra one-fifth which was at one time conceded to Sir George Stephen?

A. I do.

C. Q. 235. Are you able to state, even in a general way, what use was made of the extra one-fifth interest in your said enterprise which Sir George Stephen held at one time?

A. *We never asked Mr. Stephen to account for it.* Throughout it was greatly a matter of good faith and confidence between us, and we had so much confidence in Mr. Stephen, that we did not desire that he should account to us further.

C. Q. 236. Still, Sir Donald, the said extra one-fifth inter-

est in the said enterprise which was held by Sir George Stephen at one time involved very considerable property interests, did it not, reaching up into the millions of dollars even?

A. I am afraid that you and I would not have given many millions for it at the moment, or hundreds of thousands either, or thousands—very little for it at the moment. Property may appreciate and may become valuable, but it is very little anybody would have given for it at the time; however we showed our satisfaction and contentment in the whole matter by each of us releasing Mr. Stephen, and there with us was an end of it.

C. Q. 237. I understand from the language of your answer that you refer to a time when the said extra one-fifth interest may have been disposed of by Sir George Stephen in some way or for some purpose: Am I right in that understanding?

A. I speak of no particular date or time but of the one-fifth interest assigned to Mr. Stephen to be dealt with at his discretion in assisting us to procure the property.

It seems incredible that men of so much astuteness should never ask for any account of property they were jointly interested in, and which would represent an issue of stock in the new company to a nominal amount of, say, three millions of dollars.

Mr. Stephen's testimony as to what Mr. Farley stated as his grievance against Kittson and Hill, before the foreclosure sales and about the time of the organization of the defendant company, does not agree with that of Mr. Kennedy or Mr. Hill *in very important particulars.*

Mr. Stephen testified on this matter of what Mr. Farley's complaint was, and how he was then put off, as follows:

Q. 199. Will you state whether, subsequent to such organization, and in the latter part of May or early part of June, 1879, you had any conversation with Mr. Farley in which any of his grievances against Mr. Hill, or Mr. Kittson, were mentioned; if so, please state when and where that conversation took place, who were present and what was said?

A. About the time of the re-organization of the "Mani-

toba" Company, I remember a conversation that took place, I think at the Merchants' hotel, between Mr. Farley, Mr. Kennedy and myself. *Mr. Farley complained very much of being "left out" as he expressed it.* That we had appointed people to the Board of Directors who had had no experience as railway men, and he seemed to think that that was an honor which he deserved to have, Mr. Kennedy explained to him that it was impossible that he could be a director—being receiver—*and then it was, I think at that interview, that he spoke of promises made by Mr. Kittson and Mr. Hill to him and that he wanted to have these promises put in "black and white." He was not willing to leave anything of the kind in an indefinite shape—that he had no confidence in Mr. Hill.* Mr. Kennedy and I (myself especially) tried to assure him that he should be satisfied that any promises that Mr. Hill and Mr. Kittson ever made to him would be carried out. *That I would undertake that they would carry them out.* The impression made upon my mind at the time, and I think I said so to Mr. Kennedy; I said that Mr. Farley understands now the reason why he cannot be a director; we have explained that to him, and that if he got ten or twenty thousand dollars as a "bonification," he would go back to Dubuque quite happy.

Q. 200. In that conversation, what did Mr. Farley say had been promised him?

A. He didn't say that anything had been promised him.

Q. 201. What did he say on the subject of promises that he wanted put in "black and white"? What claim did he make?

A. That Mr. Kittson and Mr. Hill had promised to do *something* for him, and that he then *wanted to know what they meant—wanted to have it definitely fixed.*

Q. 202. Am I to understand that Mr. Farley's statement was simply the general one that Mr. Hill and Mr. Kittson had promised to do something for him, and he wanted that something made definite, or did he state what that something was? Please give Mr. Farley's language as nearly as you can, or the substance of it.

A. *He made no definite statement as to what he expected*; and the impression made on my mind by the whole conversation was, as I have said before, that he would be highly satisfied with a gratuity of ten or twenty thousand dollars. (1,260–1.)

A very pertinent inquiry arises upon the face of this testi-

mony by Mr. Stephen, viz.: What need would Mr. Farley have that Kittson and Hill should put anything "in black and white" if Mr. Stephen *was merely to pay a "bonification,"* and Kittson and Hill had made no promises to or agreements with Mr. Farley? If Mr. Stephen expected to simply pay Mr. Farley a "bonification" of $10,000 or $20,000 out of the extra one-fifth interest, and that he would then "go back to Dubuque quite happy," why did not Mr. Stephen say so to Mr. Farley, and put the matter in that shape?

It seems apparent that the full truth on this subject is not revealed to the court by Mr. Hill, Mr. Stephen and Mr. Kennedy. We believe it can only be found in the testimony of Mr. Farley and Mr. Fisher, who testified that Mr. Farley, by agreement, was to share equally with Kittson and Hill. The extra one-fifth interest divided up in some way not yet disclosed, and which extra one-fifth share has never been accounted for, *nor, so far as the evidence shows*, used in getting any outside associate or associates (as was provided by the contract, might be done, if necessary), is undoubtedly the motive for the duplicity which is so clearly apparent in the dealings with Mr. Farley.

III. Attempted Corroboration of Mr. Hill.

Having considered Mr. Hill's testimony in its bearings on each part of the case, we will now discuss the testimony given by other witnesses, including Mr. Kennedy.

After the testimony of Mr. Farley and Mr. Fisher, and after the introduction of documentary evidence, the proofs for complainant, in chief, were closed on November 26, 1887. (405–7.) Subsequently to such closing, the deposition of Mr. Carp, taken on written interrogatories, was returned by the United States consul from Holland, and filed January 4, 1888. (451-553.)

The time for the defendants to take their testimony, which had been fixed by stipulation to begin December 1, 1887, and to expire April 1, 1888, (48), having about expired on February 18, 1887, it was, by stipulation, extended to May 1, 1888. (553.)

On March 27, 1888, Mr. Hill's deposition was begun, and it was ended on April 13, 1888. (807.)

The time for the defendants was again extended from May 1 to June 1, 1888. (953.)

Edward T. Nichols.

Notice was given of the taking of Mr. Kennedy's and Mr. Nichols' testimony, in New York, to begin on April 18, 1888. (954.) Mr. Edward T. Nichols' testimony was taken at that time, but Mr. Kennedy, as appears by physician's certificate, was not able to attend. (991.)

Mr. Nichols had been a clerk of Kennedy & Co., and at the time of testifying was the assistant treasurer of the defendant railway company. (955.)

He identified a number of letters by complainant and others to Kennedy & Co., and some of the letter-books of Kennedy & Co., which were introduced; but refused to produce any other letters pertaining to the case which were asked for by complainants' counsel, though he admitted there were such letters written by Mr. Farley. Mr. Nichols stated that he was not able to produce such other letters, and that the ones introduced had not been produced by him, and were not in his possession. (987-8, C. Qs. 14 to 19.)

Complainants' counsel were subsequently obliged to go to Berne, Switzerland, to attend the taking of Mr. Kennedy's deposition.

R. B. GALUSHA.

Instead of calling Mr. Kittson as a witness, the defendant chose to rely upon certain outside witnesses, the first of whom was R. B. Galusha, whose name appears as counsel in this case, and who was called on May 2, 1888. (1,041.)

Mr. Galusha was Mr. Kittson's personal attorney as early as 1863, and also attorney for the Transportation Company and the Hudson Bay Company (1,041); but Mr. Galusha, who, of all possible witnesses, should have known, if it were true, that there was a Prior Scheme in which Mr. Kittson was interested, to acquire the property in question, in 1873, 1874 or 1875, placed himself *in square opposition to Mr. Hill's recollection* in stating when he, Mr. Galusha, first heard of such a a thing. He said:

Q. 5. You are familiar, of course, with the questions at issue in this case in regard to the formation of a syndicate of Messrs. Smith, Stephen, Kittson and Hill for the purchase of the bonds held by the Committee of Dutch bondholders of the St. Paul and Pacific and First Division of the St. Paul and Pacific Railroad Company: When was your attention first called to any Scheme on the part of Messrs. Kittson and Hill looking to the purchase of the Dutch Committee's holding?

A. I should say *along in the Spring of 1876*—probably March. (1,042.)

In this connection it is interesting to note that Mr. Hill had testified when he was stating whom he told about his early scheme of 1874, that Mr. Galusha was, *he thought*, one of the parties. (573, Q. 79.)

Mr. Galusha's testimony after making the last answer quoted, was confined merely to stating what he knew of matters after the spring of 1876, in the course of carrying out the enterprise.

He stated as to the interview in the spring of 1876:

"I think I gave Mr. Hill a written memorandum giving my views upon these points; that is, that the then pending foreclosure should be carried to a completion," etc., etc. (1,043 Q. 12.)

Subsequently, when Mr. Smith testified, a written opinion signed by Mr. Galusha was produced, *but it bore no date, and, strangely enough, was endorsed as in duplicate* (1,266), and Mr. Galusha, who was afterwards recalled to identify the opinion, first stated that the document was the opinion which he prepared at the instance of Kittson and Hill, as stated in his testimony in May. (1,478, Q. 3.) But on cross-examination Mr. Galusha refused to testify positively that the paper in question was written before the month of April, 1876. His words were: "As nearly positive as I can be without swearing to an absolute certainty." (1,479, C. Q. 4.)

When Mr. Galusha was asked the direct question as to whether he had not prepared written opinions for Mr. Stephen to take with him to Europe in 1877, *he refused to declare that he did not*, but answered as follows:

C. Q. 15. You have stated that you did not recollect any special opinions written by you to be taken by Sir George Stephen to Europe: Do you mean to be understood that you made no written opinions on the occasion of his going to Europe in this matter?

A. I do not recollect of preparing any with special reference to that visit for his use *beyond this document, which I presume he had*, and the letters or communications which I have already spoken of.

C. Q. 16. You say you presume he had this particular opinion—Exhibit 117—with him when he went to Europe?

A. *I should say from his testimony simply,—I think he states he took that with him, but I won't be positive as to that.* (1,481.)

Mr. Galusha stated he had never consulted with Mr. Farley in these matters, and no one has ever testified that Mr. Galusha did ever consult with Mr. Farley.

On his cross-examination Mr. Galusha was asked as to the matter of the private, inside letter from Mr. Stephen, announcing his agreement with Mr. Litchfield, and Mr. Galusha had *no recollection* of its being shown to Mr. Kittson, nor whether Mr. Kittson was in St. Paul at the time. (1,067.) That matter we have sufficiently discussed with Mr. Hill's testimony.

Mr. Galusha was called a third time, but only to identify certain minutes of the First Division Company. (1,502–4.)

Henry P. Upham.

Having finished Mr. Galusha's deposition, Mr. Henry P. Upham was called. (1,069.) Mr. Upham testified as to his knowledge of the indebtedness and bonds of the companies as early as 1873–4 (1,069–72); and as to his acquaintance and intimacy with Mr. Hill. He was asked if he had heard Mr. Hill say anything with reference to a plan for purchasing bonds and acquiring an interest in the railroads. To this he replied that he had; that he heard Mr. Hill constantly speak of it from early in 1874, down to the time of the foreclosures, daily and weekly. (1,072–3, Q. 17.) The first time he heard it mentioned he says was prior to May 2, 1874, at the Old Club House. When asked, however, to state what the conversation was he heard, he utterly failed to give anything except "*the idea that Mr. Hill had in his mind.*" He testified:

Q. 20. State as far as you are able the conversation you had with Mr. Hill, or the statement that he made on the subject referred to in the old club house you have referred to.

(Objected to as incompetent, irrelevant and immaterial.)

A. It is of course impossible for me after this lapse of time to give the words of any conversation, *but the idea was* that—that the idea that Mr. Hill had in his mind—the scheme or plan in view,—was to acquire this property—all this property—the St. Paul & Pacific, main, branch and

extension, land grants and franchises, by the purchase of these bonds which were then held in the majority by the Dutch committee. He hoped to be able to raise the money through Donald A. Smith, who then resided at Winnipeg and Montreal. He was the head of the Hudson Bay Company in America. At that time Norman W. Kittson was the resident agent or factor here for that company, and his relations were very close with Mr. Smith. Mr. Hill's plan was to secure this property by purchasing these bonds and foreclosing; thought they would be able in that way to cut out the stock of these roads, which was held mostly at that time by Mr. Litchfield on the main and branch line, and if he could not squeeze him out he would have to buy the stock. *That is my language.* (1,073–4.)

The next question and answers were:

Q. 21 Have you in your last answer stated in substance what Mr. Hill said or talked in reference to that subject in the old club-house in 1874?

(Objected to as leading, and also for the reason that the same is incompetent, irrelevant and immaterial. And counsel for the complainant objects to last answer as given by the witness as not responsive to the question, and as not purporting to state the conversation of which counsel for defendants asked the witness, and moves that the same be stricken out.) (1,074.)

A. I have.

But counsel was not satisfied with that answer, and pressed for *something more definite* by the next question (Q. 22), the answer to which contained nothing in addition to what he had already stated, except a reference to matters which happened long after the beginning of the year 1876, such as the offer for the property through Mr. Carp, and "the different twists and turnings of that negotiation," etc, etc. (1,074, Q. 22.) And still counsel was not satisfied, and pressed for *more definite expressions* from the witness, but without success. (Q. 23 to 24.) Mr. Upham being asked as to representations made by Mr. Hill as to the situation of the property, its terminals and land grants, answered:

A. Yes, it was a favorite recreation, *we will call it*, with

him to figure up the value of the land grant, the value of the terminals, the value of the franchises which were granted before the state was admitted to the Union; he used to attach some value to that; thought the state could not regulate the rates for transportation, etc." (1,075.)

He stated Mr. Hill read many of the letters and communications he received as to the price of the bonds. (Q. 26–8.) Still, the attempt was renewed to get Mr. Upham to say *something definite*, until finally (1,078, Q. 45) Mr. Upham said:

"I do not think I can state that any more fully than I have."

On being pressed, in this matter still farther, and, as it would seem unreasonably, Mr. Upham finally put a quietus on the method of examination as follows:

Q. 50. Now, to what extent did you communicate your knowledge in 1874, and from that on, to Mr. Hill?

(Same objection as last above.)

A. As I have before said, we were on intimate terms, and I always talked freely with Mr. Hill, and gave him all information that I had about these bonds, and the prices of them.

Q. 51. Did you know of any conversations between Mr. Hill and Mr. Kittson on the subject of acquiring the bonds and the railroad property?

(Objected to as incompetent, irrelevant and immaterial.)

A. Yes, sir; I was present at a long talk in the old clubhouse on 8th street, between Mr. Kittson and Mr. Hill, while they were discussing this matter.

Q. 52. State, if you can, as far as you can, the conversation that you heard on that subject, between Mr. Kittson and Mr. Hill?

(Same objection as last above.)

A. It was a general talk about the enterprise of acquiring the property.

Q. 53. WELL, GIVE IT?

A. *Oh, I couldn't give it. I cannot repeat conversations that occurred ten years ago verbatim. I have given you the sense of it.*

Q. 54. Give me your best recollection of the conversation, or the substance of it?

(Same objection as last above.)

A. Mr. Hill was showing Mr. Kittson the advantages of acquiring this property, and the money that could be made out of it; that was the sense of it.

Q. 55. *Can you give any more in detail than you have what the conversation was, what either party said?*

(Same objection as last above.)

A. No.

Counsel for the defendants close their direct examination, etc. (1,079–80.)

On cross-examination it was shown at once that the only conversation with Mr. Kittson and Mr. Hill, the date of which Mr. Upham would attempt to fix, was the one already mentioned, at the Old Club House before May 2, 1874. (1,080–1.)

He said:

C. Q. 6. Then you wish to be understood that you cannot fix the date when any conversation occurred between Mr. Kittson and Mr. Hill at which you was present except the one which occurred about May, 1874. Is that what you wish to be understood?

A. YES, SIR. (1,081.)

He could state nothing as to the progress made in the enterprise, according to what he heard, up to 1876,—he said:

C. Q. 8. During any conversations between Mr. Kittson and Mr. Hill, which occurred, say in the year 1875, what was the state of the project which they then had in view according to their conversations at that time in 1875, say?

A. Well, as far as I remember, they had not made very much progress in the matter.

C. Q. 9. What up to that date, and including the year 1875, had been the progress which Mr. Kittson and Mr. Hill had made according to what you heard them say?

A. *It is only an impression with me* but I think they had made but little progress in the matter.

C. Q. 10. What progress had they made? Be as definite as you can, please.

A. I CANNOT STATE. (1,081.)

Mr. Upham was pressed for details in the matter, and said: "The trouble is that I do not remember any of the details of

this thing," etc. (1,083, Q. 22.) He then referred again to the club-house incident, and gave the description of Mr. Kittson being apparently bored by Mr. Hill, in which he related:

" * * * Mr. Kittson had very little to say. He sat there in the corner with a very calm immovable countenance, and later in the evening, as I passed by him going into another room, passing there close to him, Mr. Hill was still talking, gesticulating to him, I caught Mr. Kittson's eye, *and he just a little closed it*; said not a word, moved not a muscle of his countenance but *moved his eye* a little bit. It was fixed on my memory and I often alluded to that interview." (1,085.)

Mr. Upham was asked whether he had, prior to that club-house meeting, in May, 1874, shown Mr. Hill any of the letters received from Holland. To this he replied: "I CAN NOT STATE" (1,084, C. Q. 28), just as he testified when the Lippman, Rosenthal & Co. letters to the bank were shown him, and he was asked on re-direct examination if he had shown them to Mr. Hill. (1,117–18.)

Mr. Upham testified that he had lately looked over his files for the years 1874, 1875 and 1876, and so refreshed his memory upon the general bond business (1,086, C. Q. 41); and that he had read the Lippman, Rosenthal & Co. letter from a printed book in this case (1,079); and admitted that the book he referred to was a printed copy of testimony in this case which had been left at his office "A few days after Mr. Hill and Judge Young went to New York to take testimony in this case," and which he thinks he possibly read half through. (1,089–90, C. Q. 63–9.)

The letters produced by Mr. Hill from the Dutch bankers Mr. Upham admits he gave Mr. Hill or his counsel (1,094, C. Q. 104–6). As to how and when he came to look up the letters and gave them to counsel he said:

C. Q. 108. And when you did give them to Mr. Grover, it was about the time when you looked back through your letters of 1874, was it?

A. It was just at that time; I found this bundle of letters of Lippman, Rosenthal & Co.

C. Q. 109. At whose request or at what instance was it that you made such an examination back through your letters and papers of 1874?

A. UPON MY OWN MOTION. I had read the testimony of Mr. Farley in this case, and I saw that there was some points made that did not agree with my knowledge of the facts, and as a friend of Mr. Hill I went to work to look this thing up. *He did not ask me to do it*, and his counsel did not ask me to, *I did it on my own motion.* (1,095.)

And before Mr. Upham got through with that page of his testimony, he involved himself by saying he had not, during the search just stated, found the letters Mr. Hill had used (though he had just admitted it. Q. 104-5) and by admitting almost in the same breath, that the letters he gave the counsel, Mr. Grover,—which he had already stated were the letters Hill had produced,—were found by the last mentioned search. (1,096, Q. 116.)

He was next asked:

C. Q. 118. Do you wish to be understood that you were not requested to look back through your papers of 1874, before you did so?

A. I do not wish to be so understood.

C. Q. 119. Were you requested to do so?

A. I was.

C. Q. 120. By whom?

A. By Mr. Hill.

C. Q. 121. When did he make the request?

A. Within a few weeks; I cannot fix the date, several weeks ago.

C. Q. 122. Was it before the letters of Lippman, Rosenthal & Co. which you gave to Mr. Grover were so given to Mr. Grover?

A. Yes, sir.

C. Q. 123. Then you did not make that examination on your own motion, and in consequence of having read Mr. Farley's testimony in this case, did you? (1,096.)

To that last question Mr. Upham proceeded to explain by an answer which did not explain, stating among other things:

"Mr. Hill then said: 'have you preserved those letters which "you used to have from Holland on the subject of the bonds?" "I told him I thought I had, but did not know whether I could "find them or not." etc. (1,096-7.)

So Mr. Upham's statement of a few minutes before, that Mr. Hill *did not ask him* to examine back through his letters and papers of 1874, fell to the ground.

We submit that testimony from a witness so biased, and so indefinite in his statements, is of little value in sustaining the case of the defendants—especially when he admits that he can state no words or language used by Mr. Hill in his presence during the years 1874 or 1875. (1,100-3.)

Mr. Upham did not deny that Mr. Farley may have had information from him as to the bonds and prices as early as December 17, 1874. (1,110.)

Mr. Upham's persistence (on cross-examination) in stating what was the "idea" of Mr. Hill's scheme in 1874 and 1875, without being able to state what words or language were used about the matter, was carried to a point bordering on the ridiculous:

"C. Q. 222. And yet you cannot state any words or language which were used to you or in your presence by Mr. Hill on that subject in the year 1874 or in the year 1875, or in the year 1876?

A. I cannot remember any words of Mr. Hill in those years. I believe that I heard him speak of this matter in the three years—to be very moderate we will say—500 times. I can not remember his words." (1,112.)

We submit that the deposition of Mr. Upham is not more definite as to what Mr. Hill's prior project was, than are the statements by Mr. Hill on the same subject.

To put a fitting climax to Mr. Upham's testimony as a corroborator of Mr. Hill, after his breaking down on cross-examination, defendants' counsel sought to have him *at least* corrob-

orate Mr. Hill's sworn statement (620–1), that Mr. Upham had shown him in 1874, the private bank letters from the Dutch bankers. But Mr. Upham was too anxious to escape from further interrogatories. So he answered to a direct and beseeching question whether he showed the letters to Mr. Hill: "I CAN NOT SAY." (1,117–18.)

SIR DONALD A. SMITH.

Mr. Smith's and Mr. Stephen's depositions were taken at Montreal soon after Mr. Kittson's death.

Mr. Smith stated his employment as chief commissioner of the Hudson Bay Company, and alluded to the slow development of railroad matters in the Northwest, the stoppage of building on the Minnesota lines in 1872 (1,125–7), and said:

A. Of course we were all very glad to find that there was a probability of having the road done to Pembina in 1872, and we hoped—*I am afraid in looking back and not having prepared myself in regard to those matters, it is a somewhat difficult matter for me*), and we hoped that that once accomplished the Canadian government would have completed the road down to Winnipeg. Finding that the building of the road was arrested I made inquiries with regard to it and with regard to the feasibility of having it completed. I had some communication on the subject with some of those persons interested in the bonds—a Dutch gentleman I think, by the name of Carp; a letter from him on the subject. But after a good deal of communication on one side and the other, and after talking the matter over very carefully and very fully with Mr. Kittson, we couldn't see any likelihood of its being carried out by the parties who then controlled the road. It was only after that, that I came seriously to think of acquiring the road so as to have it completed; and Mr. Kittson being at that time an agent of the Hudson Bay Company, to some extent acting under my own orders and instructions, and as the Hudson Bay Company were deeply interested in the Northwest and in getting their transportation in the best way, I asked Mr. Kittson to get such information with regard to it as could readily be obtained. (1,127.)

Mr. Smith says his requests to Mr. Kittson for information were *mostly verbal*, yet he says:

"I have no doubt I must have had some correspondence with him, but I can not speak particularly or exactly with regard to it." (1,128, top of page.)

He testified as follows:

A. From the several conversations I had with Mr. Kittson I understood that he would be in a position to get information in regard to this; that he knew,—was intimately acquainted with Mr. Delano, who was then connected with the road, and from this and other sources he would be able to get useful information; at any rate I requested,—asked him to endeavor to learn all about it that he possibly could. (1,128.)

A. So far as I can recollect it was early in the winter of 1874 when Mr. Kittson introduced me to Mr. Delano. I met Mr. Delano with Mr. Kittson.

Q. 19. Where was this?

A. In St. Paul; and received from Mr. Kittson and Mr. Delano together a good deal of information with regard to the road, some of which was in writing—statements; Mr. Delano himself saying that he thought it would be an admirable property to acquire.

Q. 20. Were those written statements delivered to you?

A. To the best of my recollection I received such statements either from Mr. Kittson—most likely from Mr. Kittson at that time.

Q. 21. What has become of the statements which you received at that time?

A. That, I am sorry to say, I do not know. My impression was that these statements some time afterwards I had handed to a friend in Montreal—Mr. George Stephen; but whether I did so or not, I cannot say.

Q. 22. Have you made search for these statements which were so furnished you with a view to finding them?

A. I have made search to some extent for them but have not succeeded in finding them.

Q. 23. Do you know where they are at this time?

A. I do not.

Q. 24. Do you remember in whose handwriting any of those statements were, if so, will you please state?

A. Well, I certainly am under the impression that a por-

tion at least were written by Mr. Delano; I was not intimately acquainted with Mr. Delano. (1,129.)

Q. 28. Upon receiving these papers from Mr. Kittson to what extent if any did you discuss them with Mr. Kittson and Mr. Delano or either of them?

(Objected to as incompetent, irrelevent and immaterial.)

A. I believe that we discussed them for some considerable time and the understanding between us was that I was to be kept informed by Mr. Kittson of such further information as he could obtain regarding it. I showed a desire to know as much about it as possible, as failing to get the road through in any other way, I should have been glad to have been able to induce others, along with myself, to take it up, if it could be got upon such terms as these gentlemen thought it could be obtained; that was very little indeed, as they thought at that time. (1,130.)

A. Mr. Kittson showed that he took a very warm interest in it and he was of the opinion that it would be a very profitable thing indeed if the road could be acquired on anything like the terms that they thought it probably could be got for. (1,131.)

A. I have no doubt I was further informed by Mr. Kittson in regard to it; and I think it must have been in 1874, *or early in 1875, I understood an effort was to be made to get some legislation* in regard to a portion of that road leading to the feasibility of acquiring it, with its branches, in the event of those then holding it not being able to prosecute the work. (1131.)

Q. 33. State whether at these times that you passed through St. Paul you were in the habit of meeting Mr. Kittson?

A. On every occasion I believe when he was there.

Q. 34. And on those meetings with Mr. Kittson, to what extent, if any, did this matter of acquiring the bonds secured on these properties and thereby acquiring the properties, form a subject of conversation between yourself and Mr. Kittson.

Same objection as last above.

A. That was by no means my principal business, still I believe that on every occasion the matter was spoken of, and that I got, from time to time, such information as Mr. Kittson was able to procure with regard to it—such further information.

Q. 35. And during those years 1874 and 1875, and in these

conversations with Mr. Kittson, what did Mr. Kittson say in regard to the desirability of carrying out the idea of acquiring these properties by means of the bonds?

Same objection as last above.

A. He thought it was very desirous to do so, if possible, and that it was feasible, too. Mr. Kittson throughout did not hesitate to say that he himself did not have the means—or money—to make the purchase, and from representations with regard to it and the information they got, I, if not very sanguine, was still hopeful that when placed before friends who had means, that they would be induced to join with myself and others with a view of acquiring it in connection with Mr. Kittson, *and I should say also latterly, with Mr. Hill.*

Q. 36. When did you first meet Mr. James J. Hill and make his acquaintance?

A. I met Mr. Hill on the prairie first between St. Paul and Ft. Garry, before the place was named Winnipeg, in March, I think it was, 1870, and near to Elm River, I think it was. I have a very distinct recollection of that. I was on my way out from Ft. Garry at the time with a friend who was acting as my secretary; we had a dog train, and Mr. Hill came on on his way to Ft. Garry.

Q. 37. During these years, 1874 and 1875, when you, as you have stated, met and had conversations with Mr. Kittson as to the project, did you meet or converse with Mr. Hill on the same subject?

(Same objection as last above.)

A. *I met Mr. Hill repeatedly but my conversations were chiefly with Mr. Kittson*, although I was aware that Mr. Kittson and Mr. Hill were in a great measure acting together. The very fact of my relation to Mr. Kittson in connection with the Hudson Bay Company threw me more in his way.

Q. 38. During the years 1874 and 1875, did you meet Mr. Hill at Ottawa or at Winnipeg, and have any conversation with him?

A. 1874 and 1875?

Q. 39. 1874 and 1875; in regard to matters affecting the properties of the First Division and Extension lines as to any idea of acquiring those properties by means of acquiring their mortgage bonds.

Same objection as last above.

A. I have no doubt that during 1874 and 1875 I met James J. Hill in Winnipeg, and also in Ottawa in 1874 and

1875, *and that the subject would have been talked of by us, but I cannot state specifically as to what took place then as between Mr. Hill and myself.* We repeatedly talked the matter over and he appeared to have a perfect knowledge of the whole thing.

Q. 40. Your last answer referred to the years 1874 and 1875?

A. I am speaking of 1874 and 1875. (1132–3.)

Mr. Smith was then asked as to the visit by Mr. Hill to Ottawa, in March, 1876, (1133), but which it is unnecessary to discuss.

He was then shown the Galusha opinion (without date), and asked whether it was brought by Mr. Hill to the March meeting. To this he replied:

I will not say absolutely that it is one of those papers but I think it more than probable that it is,—that this is one of those. (1135.)

He stated, in substance, that he had brought up these matters with Mr. Stephen between the fall of 1873 and March, 1876. He said:

"* * * I had frequent conversations with him. I brought it up again and again to him from 1873 upwards, and my impression is that such informarion as I got from time to time, *including that received from Mr. Kittson and Mr. Delano*,—or at any rate much of it—I communicated verbally and in some cases by handing him such statements or papers as I might have had." (1137, Q. 62.)

It will be observed that there is nothing in this testimony to show that the matter brought up to Mr. Stephen, was not the Delano scheme, (the nature of which, and the connection of Hill and Kittson with it, are already fully before the court), so far as it was brought up. Besides that Delano scheme Mr. Stephen remembers nothing of any scheme to acquire the property until 1876, as we will show when we reach his testimony. Mr. Smith having omitted to state that he met Mr. Hill about these matters,—it is true he says he met him, but could state nothing that was said between them,—counsel

called Mr. Smith's particular attention to the matter the next day (1146), and he was asked and testified as follows:

Q. 94. In your visits to St. Paul in the years 1874 and 1875, state whether or not you were in the habit of meeting Mr. James J. Hill, and whether you were aware that he was concerned with Mr. Kittson in procuring information for you in regard to the property and indebtedness of the First Division and the Extension properties, and whether you conversed with him or obtained information from him on those subjects?

Same objection as last above.

A. During 1874 and 1875, and more especially 1875, I met Mr. Hill repeatedly, sometimes alone and at other times with Mr. Kittson; and *I haven't the slightest doubt* that we had conversations with regard to the road and the possibility of acquiring it. I knew also that he had been acting more or less with Mr. Kittson in the matter; but I would repeat that *it was with Mr. Kittson more particularly* that I had communication and conversation on the subject, that is, during the years 1874 and 1875. (1146.)

Mr. Smith says he considers the idea of obtaining the property originated with him. (1147.)

He told a number of different stories as to when the interests were agreed to be divided into one-fifths, first stating that it was in May, 1877, then that it was not until March, 1878 (1149, Q. 102); and afterwards, on cross-examination, was worse mixed than before. (1190, C. Q. 228-30; C. Q. 232.)

He was asked:

"* * * To what extent, if any, was it considered by yourself and Mr. Stephen, or mentioned to you by Mr. Kittson and Mr. Hill, or either of them, that it was essential or important to the success of the enterprise that Mr. Farley should be associated in it or that he should be retained in the management." (1151.)

To this question Mr. Smith returned *not a positive denial* that Mr. Farley was mentioned as being associated in the scheme, or to be retained in the management, but fell back upon *a mere lack of memory on the point.* He said:

A. *I have no recollection* that during that period any suggestion was made either by Mr. Kittson or Mr. Hill with regard to Mr. Farley's having an interest in the project, and I certainly do not recollect that it was proposed he should have the management of the road either by Mr. Kittson or Mr. Hill. As regards Mr. Stephen and myself it stood so. I had had a long and intimate acquaintance with Mr. Kittson, much more intimate than with Mr. Hill, and I had the most implicit faith and confidence in Mr. Kittson and any statements he might make to me, etc., etc. (1,152.)

Yet, it is seriously claimed that Mr. Smith originated the plan, and in fact the entire scheme to acquire the property, and, with Mr. Stephen, dictated who should be admitted to it, and who should not. If it were true that Mr. Farley was unknown in the discussions between Kittson, Smith and Hill, is it probable Mr. Smith would not remember positively and absolutely whether Mr. Farley was mentioned as an important factor at the outset, and whether he was to share in the scheme with Kittson and Hill? His falling back on "no recollection" in this important matter is on a par with his statement that no account was ever asked of Mr. Stephen as to the disposition made of the extra one-fifth share.

He testified that he never heard that Mr. Farley *made any claim* of interest until long after they had acquired the road. (1,152.) A safe statement, *positively made*. Why did he not say positively that he never heard Mr. Farley mentioned by either Kittson or Hill as a party in interest?

On cross-examination Mr. Smith evaded the questions and fell back upon a lack of recollection.

The following shows the tenor and style of his answers:

C. Q. 1. Sir Donald, what steps did you take in the year 1873, towards carrying out, or into effect, the project of purchasing the bonds or property of said two railroad companies, aside from asking Mr. Kittson to obtain information for you? (1,152.)

A. As far as I can recollect, I took no specific steps in 1873.

C. Q. 2. What steps in that regard did you take in the year 1874?

A. After getting the information from Mr. Kittson and Mr. Hill I made inquiries generally as to how far it might be possible to acquire the means for taking up the road; but in the first instance in making the inquiry of Mr. Kittson with regard to the position of the road, *I did not personally—individually—think of taking it up.* (1,152, 1,153.)

C. Q. 11. In so far as you had interviews with Mr. Hill on the subject in question in the year 1874, please state as fully as your memory will permit the words or language which Mr. Hill used to you in giving you information as to said railroads or their affairs? (1,154.)

A. *My memory does not serve me sufficiently to enable me to state particularly what may have been said to me by Mr. Hill on the subject during the year 1874.*

C. Q. 13. If Mr. Delano, as a matter of fact, in the latter part of the year 1873, and early part of the year 1874, had in hand a Scheme or Project on his part, perhaps in connection with others, with reference to the Branch Line of said First Division Company running from St. Anthony to St. Cloud, and projected from St. Cloud to Watab or Brainerd, do you mean to be understood that you was not then informed of what Mr. Delano's Scheme was, if any, in that regard?

A. *I cannot bring myself to recollect any particulars with regard to that.*

C. Q. 14. Then you do not mean to state that if Mr. Delano had such a scheme you was not informed of it at the time, do you?

A. *I will not say that it may not have been spoken of*, but I most certainly have no recollection of any particulars with regard to it at this moment—NONE. (1,155.)

C. Q. 26. Whether the written Statement in Mr. Delano's handwriting contained information or suggestions relative to any Branch Line project, if at all, you do not recollect?

A. *I do not recollect;* and they would have been, if confined to that, they would have been of very little value to me as I looked upon it at the time; *my chief object* being to have the road completed through to St. Vincent or to the international boundary.

C. Q. 27. In pursuance of the information which was contained in Mr. Delano's said Statement, did you take any active steps, in 1874, to carry out the project of purchasing, aside

from such conferences as you may have had at or about that time with Sir George Stephen?

A. I did not mean it to be inferred from anything that I said with regard to that interview with Mr. Kittson and Mr. Delano, that the information I then got was confined to any statement from Mr. Delano. Mr. Kittson gave me such information as he was able to procure, including this, which to a certain extent, as I think I have already mentioned, *was to a certain extent in the handwriting* of Mr. Delano; *and with me, in the first instance, it was quite an intermittent thing. I had much to do besides that*, and I was going to England occasionally on other business and had opportunities of meeting and conversing with friends on the subject of the Northwestern states and of the Canadian Northwest, endeavoring to impress them with the importance of that country, so that they might be induced to take an interest in it.

Q. C. 28. Did you visit England in the year 1874?

A. *I must have done so*, although I could not say at what particular time.

C. Q. 29. Did you visit England in the year 1875?

A. *I must have done so*, although I could not say at what particular time.

Q. C. 30. Did you visit England in the year 1876?

A. I think I also did in 1876.

C. Q. 31. Are you able to state the times or the months of such visits, if at all?

A. No, I can not; but I think in several of those years I must have visited England more than once in the course of the twelve months; in fact I think in all those years—I think so. It was a very usual thing for me to go to England, but I will add without hesitation that I never, during all those years, went solely for the purpose of speaking for this road. (1157–8.)

He was asked to search for letters to him, or copies of letters written by him to Kittson or Hill in any of the years in question. But none were produced. (1158, Q. 36; 1224, R. C. Q. 1.)

Mr. Smith showed the greatest ignorance of the events in Minnesota with reference to the affairs in question from 1873 to 1877. (1160–3.)

He did not know whether, early in 1874, a receiver *had yet*

been appointed of the Extension Lines, nor of the First Division property. (1160, Q. 43-4.)

Nor when adverse legislation occurred. (1160-1.)

He repeated that he did not know whether a receiver had yet been appointed of the Extension lines in the year 1874. (1162, Q. 56.)

He did not know whether the trustees had, during the years 1874 or 1875, as yet taken possession of the First Division property. (1162-3.)

He did not know when Mr. Barnes became president of the company. (1163, Q. 59.)

Nor whether it was before the trustees took possession or afterwards. (1163, Q. 60.)

He would not say positively that the Galusha opinion was not prepared in the year 1877, to be taken to Europe by Mr. Stephen. (1166, Q. 74-5.)

He could not state the year in which the Red River Valley Railroad Company was organized. (1167, Q. 77-9.)

He contradicts Mr. Hill completely as to the object of organizing that company.

"As I understood it, the important object of Mr. Kittson and Mr. Hill in getting up the Red River Valley Company was the extending from Crookston to Fisher's Landing,—the important object." (1168.)

He admits no negotiation was opened to buy the bonds in 1874 or 1875. (1173, C. Q. 107-11.)

Being asked what deterred him in 1873, 1874 and 1875, he said he had not made the necessary arrangements, it was not a vital point with him, and there was a lack of complete information, and gave the answer already quoted in full, as to Mr. Delano's not being so familiar with the main line. (1173-4.)

At this point in his examination Mr. Smith adopted Mr. Hill's method of statement, as follows:

C. Q. 119. You left the matter then to rest until sometime in the year 1876, before you opened, or caused to be opened, any direct negotiations or further direct inquries in and about the matter, if I understood you correctly?

A. In the meantime from the early part of 1874 upwards, *the thing was kept in mind*, and from time to time it was spoken of between Mr. Kittson and myself. *He was, as I believed*, getting all the information *he could*. He had himself, as he informed me, a strong incentive for keeping it in view; that was that he had a large interest in the Red River Transportation Company, and that would be affected to his advantage or disadvantage, according to what might be done with those roads,—that is, into whose hands they might fall. (1174.)

And again admits no negotiation was opened to buy the bonds in 1874 or 1875. (1174, Q. 120.)

He does not remember whether any application was made to him for a loan to the Red River Valley Railroad Company. (1175, C. Q. 122.)

Nor when the land grant on the extension lines became forfeited, (which was December 1, 1873, though afterwards extended,—1554). (1175, C. Q. 123.)

He remembers no effort to secure a lease of the Extension Lines so that they might be operated with the projected road last named, as Mr. Hill had testified. (1175, C. Q. 126.)

He remembers nothing of any litigation as to the land grant title of either company. (1176, C. Q. 128.)

He did not know who built the Cut-Off or Link line from Breckenridge to Glyndon; nor could he fix the year in which it was built. (1177, C. Q. 136 and 141.)

Nor who furnished the money to build it. (1178, C. Q. 143.)

He did not know whether Mr. Hill was a practical railroad man when he first met him or not. (1178, C. Q. 145.)

Nor to what extent Mr. Hill had practical knowledge of railroad affairs in 1875. (1178, C. Q. 147–9.)

He could state nothing as to what was the condition of affairs generally as between the bondholders and stockholders of the First Division Company when Mr. Hill called upon him in March, 1876. (1179, C. Q. 153½.)

He had no memory he could state on that point.

Nor any as to the date of the opening of the negotiations with Mr. Carp.

Nor of the first proposition in writing sent to Mr. Carp. (1187, C. Q. 205–6.) This may well be compared with Mr. Farley's replies on the same matter (154, C. Q. 186–7), given before the proposition was returned in Mr. Carp's deposition.

Mr. Smith thinks the information brought to him in March, 1876, by Mr. Hill, included information as to the prices of the bonds (1,188, C. Q. 214); yet Mr. Hill says it was then for the first time Mr. Smith gave directions to go ahead and ascertain at what prices the bonds could be got. (583.)

He could not tell when he first heard Kittson and Hill had opened negotiations of any kind with the bondholders or their agents. (1,189, C. Q. 219.)

Nor when he learned that Mr. Carp was in St. Paul, after his interviews with Mr. Delano. (1,189, C. Q. 220.)

Nor whether the negotiation was opened with Mr. Carp or the New York agents. (1,190, C. Q. 222.)

Nor whether any negotiation had been opened with the Litchfields as to the stock, before September 1, 1877. (1,190, C. Q. 224.)

He could not state the date when the Litchfield stock was bought. (1,190, C. Q. 227.)

And, at the closing of his deposition, he made the statements as to what was done in the division of the five interests in the

enterprise, to which we have already called attention under the discussion of Mr. Hill's deposition. His statement was as to the extra share that, "we never asked Mr. Stephen to account for it." (1,192, C. Q. 235.)

Mr. Smith had received before he testified a printed copy of Mr. Hill's testimony in this case—*it came in parts* he says, and one part "*missed reaching*" him. (1,193.)

If Mr. Smith was the fountain head of the enterprise—he certainly knew less about it than any one else, even with all the assistance Mr. Hill's testimony (which came in parts) could give him.

Complainant's counsel introduced and had identified by Mr. Smith a number of speeches made by him while a member of the Dominion Parliament from Manitoba (Selkirk), during the years 1875, 1876, 1877, and 1878. The tone of those utterances is such that any scheme by Mr. Smith to acquire the property in Minnesota *in the years prior to 1876*, as a private venture of his own, would seem to be out of the question. He said in a speech on March 12, 1875, that the government had been asked to aid in building a road south of Lake Manitoba (1,195, top of page); and that the people of Manitoba were most anxious to have the earliest possible railway connection between Pembina and Ft. Garry (bottom page 1195), also that "with regard to the Pembina branch he regretted to say that the line in Minnesota from Glyndon to Pembina was at a stands till. *The legislature of Minnesota had adjourned without doing anything.*" (1197.) On re-direct examination, he stated that the legislation he so referred to was the Delano Forfeiture Bill; and a copy of the speech of Mr. Delano, urging the passage of that bill, and giving the full situation at that time, was produced (1273); and that speech of Mr. Delano's, Mr. Smith admits he received about the time of its delivery,—as he must have done, Delano's speech being on February 23,

1875, and Mr. Smith's speech March 12, 1875. (1216, R. D. Q. 15–16.)

As nothing is substantiated except the fact of Mr. Delano's Scheme, and Kittson, Hill and Smith are all shown directly connected with it,—Hill and Kittson, as directors of the company organized to take advantage of the passage of the Delano Bill (1730),—in 1874 and 1875, we claim this is the only foundation that ever existed for any testimony of this or any other witness, as to a Prior Scheme to acquire any of the property in question.

Sir George Stephen.

Mr. Stephen did not corroborate the testimony of Mr. Smith or of Mr. Hill as to any idea Mr. Smith may have had prior to the year 1876, of acquiring the railroad lines in Minnesota, although an effort, *and a persistent one*, was made to obtain such corroboration.

Mr. Stephen said:

"A. As near as I can recollect, my attention was first directed to the St. Paul and Pacific Railway in 1873 or 1874, I could not state positively which, but certainly not later than 1874." (1225, Q. 7.)

And such attention he says was called by Sir Donald A. Smith. But when he was asked as to conversations with the latter "between the years 1874 and 1877, in which the matter of acquiring the bonds or properties of the said two railroad companies were spoken of," he replied:

"A. Between these years, that is 1873 and 1877, Sir Donald Smith, in consequence of his connection with the Hudson Bay Company, was constantly going through Minnesota to Winnipeg and the Northwest, and on his return from these frequent visits he spoke to me a great deal about these properties and the important part they were likely to play in securing a railway connection between the older provinces of

the Dominion of Canada and these new territories of the Northwest. (1,226, Q. 9.)

Counsel, not being satisfied with that answer, pressed for a favorable reply as follows:

Q. 10. What, if anything, in these conversations was said with reference to the idea of acquiring these properties?

To this Mr. Stephen clearly and fully replied:

"A. I cannot now recollect any particular scheme or plan for acquiring these properties being discussed previous to 1876; conversations, up to that time, had been of a general character, and made *no particular impression upon my mind*—previous to 1876." (1,226.)

And yet counsel kept up the effort by several additional questions, which were leading and in the nature of a cross-examination,—*but which were without success.* (Q. 11, to 13.)

By that persistence counsel obtained from Mr. Stephen an answer, as follows:

A. Oh, yes; all our conversations years before,—all his efforts were to induce me to join him. (1,227.)

But in what Mr. Smith wished to induce him to join, Mr. Stephen did not state. Counsel was then content to let it go, upon the inference that it was to join in such a general scheme, though Mr. Stephen had before stated that he could not "recollect any particular scheme or plan for acquiring these properties being discussed previous to 1876." (1,226, Q. 10.)

Mr. Stephen disagreed with Mr. Hill as to the time they first met and became acquainted. Mr. Hill testified that he first met Mr. Stephen in May, 1877, at the time when the second proposition was sent to Mr. Carp. (596-7.) But Mr. Stephen testified as to when the visit in that year was made, as follows: "It was towards the end of the winter; I should think it must have been about March." (1,229,

Q. 27); and on being particularly asked about the date, and shown the letter of May 26, 1877, he adhered to his first statement, saying: "I have a very hazy recollection that there was snow upon the ground at the time, but it would be difficult for me to trust my memory at this date." (1,231, Q. 38.)

Mr. Stephen was examined as to the Galusha opinion, and refused to speak positively as to when he first saw it, also as to how he expected to raise the money to buy the bonds—as to the proposition to the committee, the visit over the road, September 1, 1877, and the conversations during that visit. Also as to the meeting at Montreal in September, 1877, and whether Kittson and Hill demanded any particular share or interest; his visit to England and Holland; his negotiations with capitalists in London, his utter failure to induce anybody to believe that the property was good for anything (1,237), and finally his return to Montreal about Christmas, 1877. (1,228–37.)

Mr. Stephen testified as to the meeting and negotiation with Kennedy & Co., in New York, which resulted in buying the bonds (1,238–9), *that he originated the scheme to buy the bonds on credit* (1,240); as to the plans for carrying out the purchase (1,241); and admitted the dictation of the letter by Mr. Kennedy to Mr. Farley of April 4, 1878, and the other letters already referred to, (1,242–3.)

He further testified as to the object in having the clause in the agreement of March 13, 1878, as to withdrawing bonds for exchange for lands, that the object was to keep down the price of outstanding bonds (1,245); but Mr. Stephen was not asked whether that object was carried out.

He testified that he undertook all the financial arrangements, and Mr. Hill acted at the other end (1,247); as to the Litchfield stock matter, and Kittson and Hill putting up notes as collateral.

(1,248–9.) Also as to the desire to make up the loss on the Litchfield stock out of the outstanding bonds, but was not asked whether that was done (1,250–1); as to the protocol agreement and negotiation for it; the settlement with Litchfield and the letters then written. (1,251–5.) On the purchase of the Litchfield stock Mr. Stephen became president of the First Division Company. (1156.) He explained his letters, in which it is apparent his mind had been poisoned concerning Mr. Fisher and Mr. Farley. (1256–7.) He related the movement made to get Mr. Wakeman appointed in Mr. Fisher's place, and the great embarrassment resulting from the through rate tariff arranged with the Canadian contractors (1257–9); and as to the friction between Mr. Farley and Mr. Hill in the spring of 1879. (1259.)

Mr. Stephen then made the statement already given under Mr. Hill's testimony as to the complaints which Mr. Farley made about the time of the organization of the new company. (1260–1.)

The cross-examination of Mr. Stephen was very short. (1263–5.) He was only asked as to the date when, as he testified on direct examination, Mr. Farley advised him against the completion of the extension lines to the boundary. (1263.) As to this, Mr. Farley, however, says Mr. Stephen certainly got his impression from somebody else. (1673, Q. 29.) Mr. Stephen could not give the date of such statement.

He admitted that the through rate was rescinded by Mr. Farley very soon after the difficulty arose on that account in the negotiation with the Dominion government. (1265.)

STANFORD NEWEL.

Mr. Newel was called as a witness to corroborate Mr. Hill's testimony by relating *what Mr. Hill told him.* We have objected to all such hearsay evidence, but as it is in the record, we have examined it, and shall do the same with Mr. Newel's statements, but will endeavor to be brief.

Mr. Newel is an attorney and was a member of the firm of Young & Newel during the period when the active work was going on immediately following the purchase of the bonds and during the foreclosures, and the organization of the defendant railway company. He stated what Mr. Hill told him, beginning in the month of February, 1874, as follows:

A. I think that from February, 1874, there was not a day when I was in the city of St. Paul when Mr. Hill was here (if there was a single day it was an exception), that he did not talk with me on that subject. (1,317, Q. 8.)

A. I have a very strong impression that sometime prior to 1874, Mr. Hill talked with me on that subject, but in a very indefinite way, but I fix the date February, 1874, by this: that in 1873 I was absent in Europe * * * immediately on my return to St. Paul, Mr. Hill came into the office and * * * he spoke of this matter, and *my impression is very strong that the substance of that conversation was this:* That Donald A. Smith * * * That Governor Smith wanted to know the condition of that property; how many miles of road were built; what lands they had; what encumbrances there were. I understood that he wanted an inventory; wanted to know what there was there; depots, etc.; it would be like an inventory; *that was my impression,* and I was asked to get all the information that I could. (1,317–18.)

A. * * * Gov. Smith wanted to know what there was; how many miles of road there was built; the equipment they had. He wanted—as I said before—an inventory; and the object of that was to see whether it could be acquired. He was interested in getting railroad connection with the Canadian Provinces. He was reconnoitering to see if it could be got in that way. That is my recollection of it. (1,318.)

A. * * * That my conversations with Mr. Hill were so many (and to be truthful I must say that they were so tedious to me before I got through with it), that I cannot remember in the interval that you speak of. *I do not think at the moment of any particular conversation.* As I said before, I saw him daily when we were both in the city, and this matter was the topic of conversation. It became from day to day an all absorbing subject with him. I used to tell him that he was getting it upon the brain. He thought of nothing else and the object he had in view was the acquisition of those properties. The papers were very difficult to obtain, and I tried during all that time to get all the information I could at Mr. Hill's request. With regard to these various issues of bonds, what they were called, what they were a lien upon and the amounts, it was very difficult to obtain that information. He was positive through it all—*hopeful that through Gov. Smith, a party, of which he himself would be one, would succeed in acquiring those bonds.* Then there was a question, too, of finding who had the bonds and what condition they were in. * * * I was not the only person with whom Mr. Hill talked upon this subject. He seemed determined to exhaust every means of acquiring knowledge on that subject. (1,318-19.)

On cross-examination Mr. Newel adhered to the statements as to what Mr. Hill's plan or object was. (1,327, C. Qs. 1 to 11.)

It appears Mr. Newel was the confidential friend of Mr. Hill; that Mr. Hill's office was in the same building as Mr. Newel's (1,317); that in the spring of 1875, about April, the law firm of Young & Newel was formed, and an effort was made to get Mr. Newel to testify that the prospective law business of Mr. Hill's growing out of his railroad matters, was then considered and discussed—in fact held out to Judge Young as such—on forming the partnership—but Mr. Newel would hardly venture to so state. (1,319.) After the partnership was formed Judge Young brought with him from the court of which he had been a member, certain printed pamphlets or paper books which had been submitted to him as a judge. (Dfts. Ex., 133 to 138, 1,320-1.) Those paper books,

Mr. Newel says, were shown to Mr. Hill immediately after they were brought into the office, and were discussed many times (1,321–2); also that Judge Young had a printed copy of the mortgages. (1,322) But Mr. Newel could not swear the copy shown Mr. Hill (825, 829) was the copy that had been in his office. (1,342, C. Q. 96.)

Mr. Newel remembers meeting Mr. Hill in Chicago, and that afterwards on the train the conductor pointed out Mr. Barnes on the way to St. Paul, and that he and Mr. Hill got into conversation with Mr. Barnes, and that this was when Mr. Hill was on his way back from Ottawa in March, 1876. (1,323.) He relates their conversation with Mr. Barnes, and Mr. Barnes' effort to pump Mr. Hill. (1,325.)

In the winter of 1877–8 Mr. Newel was ill and absent, and in the spring of 1878 was in Europe. (1,326.) After the purchase of the bonds Young & Newel were employed in the business of the enterprise on legal work, Judge Young attending to it principally. (1,326, Q. 38.)

From 1874 on, Mr. Newel's firm of Newel & Brill were Mr. Hill's counsel in his ordinary business (1,326, Q. 36); and after the year 1875, Mr. Newel continued his intimate relations with Mr. Hill. (1,322, Q. 21.)

Such is Mr. Newel's story in corroboration of Mr. Hill. But we desire to point out certain features of Mr. Newel's testimony which tend, as we believe, to weaken his statement (hearsay though it is), as to what Mr. Hill's plan was, beginning in 1874.

1. He related nothing as to Mr. Delano's scheme, Mr. Hill's connection with which is proven beyond question.

In his direct examination, neither Mr. Delano's name nor the Delano corporation (1,730), were even mentioned. On cross-examination he tried to evade the Delano matter.

He says vaguely, Mr. Delano was regarded as something of

a mystery in connection with those lines. (1,330.) But if Mr. Newell had read Mr. Delano's speech of February 23, 1875, and had read the charter of the Western Railroad Company, he would not have been left to entertain the idea all these years, that Mr. Delano was something of a mystery in connection with those lines. Notwithstanding Mr. Newel's great intimacy with Mr. Hill for twenty-five years, he could state nothing as to Mr. Delano's having assisted Mr. Hill in and about this same difficult search for information which he, Mr. Newel, was at the same time engaged in. (1,330, C. Q. 17; 1,331, C. Q. 22.) Notwithstanding Mr. Hill was a director with Mr. Delano early in 1874, in a railroad organization, Mr. Newel is positive he never discussed such matter with Mr. Hill. He says: "Because I never discussed any plans of Mr. Delano with Mr. Hill," etc. (1,331, C. Q. 25.)

2. Though the firms of Newel and Brill, and Young and Newel, kept books of account, and all lawyers are supposed to preserve their papers, copies, memoranda, dockets and other *indicia* of past business, there is no entry, memorandum, docket, written copy of papers, list of suits—in fact *no written data whatever* to sustain the idea that Mr. Newel did any work whatever in looking up facts, information, or suits pending from 1873 to 1877. Nothing is produced except some printed paper books brought from the court by Judge Young *in the spring of 1875*, a year after Mr. Newel says his searches began. (See 1,332–3, C. Q. 28, 33.)

Complainants' counsel asked especially for any memorandum, docket entry, paper or copy, written during the period—*but nothing was produced.* Inquiry was made fully and particularly into this matter, but Mr. Newel was not able to produce a scrap of paper or writing, tending to corroborate the theory that Mr. Hill in 1874 or 1875, was searching for information, or that Mr. Newel assisted him, or that any of his firms kept any record of such search or work whatever. If it

were a mere inquiry into one suit, it might be different—but in this case the situation in 1874 and 1875 was, as Mr. Delano describes it in his speech, a maze of intricacies both of litigation and legislation, and he proposed to "cut straight through the cords and knots which bind this great enterprise," etc., etc. (1,294.) The letter of Kennedy & Co. to the chairman of the committee on railroads of the House of Representatives, dated February 3, 1875, given in Mr. Delano's speech (of February 23, 1875), (1,296) shows the situation of affairs at that time; and proves beyond a doubt that if Mr. Newel was trying to get together facts and information in 1874 and 1875, *he would have put some of it on paper.* But he does not even claim he made memoranda, and lost or destroyed it.

3. Mr. Newel showed complete ignorance as to the real transactions of the early part of 1874, and of the spring and summer of 1875. Not only was he ignorant of the Delano Company, but he did not know when the Red River Transportation Company was organized; nor *did he know* whether his firm of Young & Newel had anything to do as attorneys with the organization of that company. (1,336, C. Q. 50.) As the Transportation Company was organized in February, 1874 (1,732), and the firm of Young & Newel was not formed until the spring of 1875, Mr. Newel's statement is at least significant.

Though forming his partnership with Judge Young in the spring of 1875, upon the prospective business in some degree anticipated to come from Mr. Hill, growing out of Mr. Hill's railroad ventures and plans (1,319, Q. 14; 1,338, C. Q. 70), Mr. Newel was nevertheless utterly and entirely ignorant as to the Red River Valley Railroad Company, which was projected and incorporated *at that very time.* The defendants introduced the charter, dated June 5, 1875, (905–6), and the minutes of the meetings of the directors of that company, June

22, 1875, authorizing the signing of a trust deed to secure a loan of £50,000, Donald A. Smith being the trustee, and the loan to be payable in London. (907–909.) Mr. Newel answered: "At this moment, it is so long ago that I cannot remember positively *what the Red River Valley Railroad Company was.*" (1,337, C. Q. 59.)

Mr. Newel professed to know that Mr. Galusha had written an opinion on the foreclosure matter in some way (1,337, C. Q. 63). But he did not know enough about the subject to tell when it was written; he fixed the time as between the middle of 1874 and the middle of 1878 (1,339, C. Qs. 73, 74). That period was a fairly safe one to fix—covering, as it did, the entire time from the application for a receiver in the State court for the First Division property, down to the time when the work of construction was being pushed on the extension lines, under Judge Dillon's order, based on the agreement of twenty-seven articles under which the Dutch bondholders sold their bonds to the syndicate, dated March 13, 1878. It covered the period from just after Mr. Delano's company was incorporated, and Mr. Smith wanted information, down to two years after Mr. Hill visited Ottawa. *Mr. Newel thinks Mr. Galusha wrote the opinion between those dates.*

The several printed paper books produced, and which Mr. Newel's partner brought from the court, contain nothing which the court files did not contain. Mr. Newel's testimony that he could not get at those files to obtain such information as the paper books contain, besides being contradictory on the face of his own words, is past comment, coming from a lawyer of Mr. Newel's presumed intelligence and standing at the bar. We call particular attention to his replies to cross-questions 85 and 86. (1,340–2.)

Comstock and Guthrie.

These witnesses testified to nothing we care to discuss. Mr. Comstock stated that during the session of the legislature in 1877 he was in Mr. Farley's office when Mr. Fisher entered and made some remark:

"* * * something like this: stating that something would occur—I do not know what—when Jim Hill should have control or possession of the road; that was about the language used by Mr. Fisher. The language used did not impress me so much as the manner of the speaker who used what appeared to me to be a contemptous one towards "Jim Hill" as they called him. The expression was received by Mr. Farley in about the same manner. I do not remember that Mr. Farley said anything in response, but received the statement with a smile and in a manner that impressed me that Mr. Hill's project—whatever it was—was treated with a good deal of contempt." (1,348.)

Mr. Guthrie had been doing the purchasing for the company under Mr. Farley, and was at the time of testifying division superintendent of the defendant railway company. Mr. Guthrie testified:

A. I couldn't undertake to say now or repeat any conversations that took place in regard to these things, but it was generally understood around the office that these negotiations were going on; and the other employes of the office—the clerks—would occasionally make remarks about how the thing would be done after Mr. Hill or "Jim Hill" took possession. And when anything of that kind was said, it was invariably treated with ridicule or contempt by Mr. Fisher. (1,486.)

There was no cross-examination of either witness.

Edgar N. Saunders.

Mr. Saunders, who had been in the wood and coal business in St. Paul, entered upon a partnership with Mr. Hill in that business in the spring of 1875. (1,488, Q. 11.)

In discussing that partnership, which was proposed by Mr. Hill in the summer of 1874, Mr. Saunders says of Mr. Hill:

"* * * He mentioned this fact of his proposing to engage in a railroad enterprise,—outlining the fact—was well posted as to the merits of the St. Paul & Pacific Railroad (as it was then called) and that he expected to surround that property, and that it would be a great benefit to me to take hold of the fuel business with him—as he had his business at that time situated. It would put me to the front in that business and he didn't expect to devote a great deal of his time to the fuel business after he secured,—that this railroad scheme of his was running. He didn't go into details of how he proposed to do that to any great extent, except to say that the railroad was in a bad way, either bankrupt or about bankrupt, and that these bonds could be bought cheap, and that he proposed to make that his business; and he wanted me (as he thought well of me as a worker) to work the coal business. Held up as an inducement to me that when he got the railroad I would have larger interests in the coal business, and would have an opportunity to show myself; that was the substance of it. (1,488-9.)

A. I do not know that I could locate the date of any subsequent conversations, but it was the burden of all the conversations I ever had with him; however, we got the business started. The subject of this railroad enterprise of his seemed to occupy his mind to the exclusion of the coal business, and *I paid very little attention to what he said about how he was getting along with it, or what he was doing*, but felt rather injured owing to the fact that he paid so little attention to the coal business; neglected, as I thought, the interests of the firm for his interest in the railroad, in which I had no interest prospective or otherwise. The result of that was, he made a great many explanations to me when I would speak to him about it and try to get him to canvass the best methods of conducting the coal business. The conversation was almost always diverted by his going on to this railroad scheme and enlarging on it at great length; that would generally be the windup of all conversations. (1,488-9.)

Such was the substance of Mr. Saunders' direct testimony. And on cross-examination Mr. Saunders' statements were of the same character. He testified:

A. This project cut no figure in the trade between Mr.

Hill and myself,—*simply incidentally discussed and mentioned by him.* (1,490, C. Q. 2.)

C. Q. 9. Then no details or specific points in this matter were then stated to you by Mr. Hill?

A. Not that I remember of.

C. Q. 10. Your partnership was actually formed in the spring of 1875 was it?

A. Yes, sir.

C. Q. 11. Did Mr. Hill then state to you any points or details of his railroad project, whatever it may have been?

A. I do not think he did, sir, do not recollect that he did. (1,491.)

Alexander and Willis.

Mr. Alexander was twice called as a witness. His first deposition was given to corroborate the fact of the visit being made by Mr. Hill to Ottawa in March, 1876. (1,473.) Mr. Alexander accompanied him in and about the matter of securing a contract for carrying rails or freight for the Canadian Government, and Mr. Alexander testified he had in two different years made a trip to Ottawa with Mr. Hill about the same business. (1,475, C. Q. 3.)

On being recalled as a witness Mr. Alexander testified only as to the through rate matter with the Canadian contractors. Mr. Willis' testimony related also to the same subject. (1,701, 1,704.) Their testimony on that matter we have already discussed in connection with Mr. Hill's evidence.

All the foregoing testimony as to conversations between Mr. Hill and third parties, or of third parties between themselves, was objected to when given as hearsay and incompetent. We believe each of those objections to be conclusive.

J. P. Farley.

The testimony given by Mr. Farley as a witness for the defendants has been already fully shown.

John S. Kennedy.

The deposition of Mr. Kennedy has been already several times referred to. All that it seems to us necessary to say on Mr. Kennedy's testimony will be found *supra* and *infra*.

Conclusion on Facts.

Having concluded the examination of the testimony of Mr. Hill, with all the documentary evidence he could produce to aid him; and also that of all the witnesses who were called with a hope that they might corroborate Mr. Hill in establishing as a real and material fact, his alleged Prior Scheme to acquire the property of the railroads, we feel justified in claiming even more than we claimed in our introduction to the defendant's case.

We claim that the difficulties surrounding the task which Mr. Hill set for himself, were not only so great, that even in his own statement of his defense, on the face of his own words, the failure is apparent, complete and overwhelming; but that the successive failures, of witness after witness, to corroborate him in any material point, or on any important question, justifies the conclusion that the complainant's case and proofs are entirely unshaken, and stand practically without opposition on the record.

We claim the contract and agreement between the complainant and Kittson and Hill, as set out in the bill, is not only clearly and satisfactorily proven and sustained by the evidence, but that the carrying out by Mr. Farley of all his undertak-

ings and engagements in the premises, honestly, laboriously and in good faith to everybody concerned, is equally well proven in every respect.

As we view the matter, it only remains necessary to point out wherein we think the learned judge of the court below erred in his view of the proofs, and to state the points of law and authorities upon which we rely in our contention that the decree of the court below should be reversed.

OPINION OF THE CIRCUIT COURT.

The opinion of the learned judge of the Circuit court against the complainant (1,773), and directing that the bill herein be dismissed for want of equity (1,785), is based upon the conclusion that the contract with Mr. Hill and Mr. Kittson, as set out in the bill for the acquirement of the bonds of the railroads in question, and thereby ultimately to acquire the railroad properties, is not sustained by the evidence before the court.

The court having reached the conclusion that no contract between the complainant and the two individual defendants, had been made, of course did not pronounce an opinion upon the questions of law involved in this case.

I.

The opinion of the court below contains a statement, very briefly, of the case as it appeared upon the hearing, after the decision of the Supreme court upon the plea, after the defendants had answered the bill, and upon the conflicting evidence upon the issue of fact arising upon the bill and answer.

The court held (Rec., 1,774):

"The question of fact, then, is whether such an agreement as alleged was entered into, and the question of law, whether, if made, it can now be enforced in a court of equity.

In reference to the question of fact, it may be premised that the complainant, Mr. Farley, and his then assistant in the management of the roads, Mr. Fisher, testify that an agreement was made substantially as alleged in the bill, while defendant Hill as positively denies the same."

The court below thereupon further found upon one of the most important questions involved in the inquiry *as to the real truth* under the issues of fact so stated, namely: the question as to the position of the defendant, Norman W. Kittson, on the substantial truth or falsity of the claim thus made against him, as well as against Mr. Hill, that:

"Defendant Kittson died before his testimony could be taken." (1,774.)

(1.) The court in the opinion, made no further reference to the subject of Mr. Kittson's failure to appear upon the witness stand, though the record, showing the course of the taking of testimony in this case, from the time the complainant's testimony was closed, on November 26, 1887, the next day after Mr. Fisher's deposition was finished (405–7), we think pretty clearly shows that Mr. Kittson never intended to testify, and that Mr. Kittson's co-defendant, Mr. Hill, and his counsel, proceeded throughout upon the plan and purpose of setting up and *carrying through a defense without Mr. Kittson's testimony.*

The interests of Mr. Kittson in the defense were equal to those of Mr. Hill. Mr. Kittson was seventy-four years old when he died, and, yet after Mr. Farley and Mr. Fisher had testified, Mr. Hill, a very much younger man, went upon the stand first, and occupied a long time (from March 27, 1888, until April 13, 1888, 807–30,) in giving his testimony.

On adjourning that day, the further taking of testimony was

to be resumed upon ten days' notice from defendants' solicitors (830). Previously to beginning Mr. Hill's testimony, the defendants' time to close proofs was extended by stipulation to May 1, 1888 (553). Upon the close of Mr. Fisher's testimony, the complainants' case in chief had been at once rested, reserving the right, secured by the order of court, for taking the deposition of Mr. Carp (407).

So far as the record shows there was nothing to prevent Mr. Kittson testifying at once, on and after November 26, 1887. (405.) If he had intended to testify the most ordinary sense of prudence would have dictated that he should do so at once. However, after Mr. Hill had finished, April 13, 1888 (807–30), without calling any further witness, defendants' counsel received a second stipulation, extending defendants' time to take testimony until June 1, 1888. (953.)

A commission was issued for defendants to take the deposition of Mr. Kennedy and his clerk, Mr. Nichols, at New York, on April 18, 1888; Mr. Kennedy's physician certified he was "suffering from nervous prostration, the result of overwork," and that it would be unsafe for him to be examined. (991–2.)

Mr. Nichols testified, produced the letters defendants desired (955–84), and *refused to produce those complainant desired.* (987–9.) (Subsequently Mr. Kennedy testified at Berne, Switzerland, 1,589.)

After the Nichols deposition of April 18, 1888, Mr. Kittson still refrained from testifying, and on May 2, 1888, R. B. Galusha, Mr. Kittsons' old-time attorney was examined for defendants (1,041), testifying to nothing of importance, *and failing to corroborate Mr. Hill as to any scheme prior to 1876.* (1,042, Q. 5.)

After Mr. Galusha finished, May 3, 1888, an adjournment was had till May 9, 1888, when still another witness, who was

a failure (Mr. Upham), took the stand in an attempt to corroborate Mr. Hill's prior scheme. (1,069.) While that witness was on the stand, May 10, 1888, nearly six months after complainant's case was closed, Mr. Kittson suddenly departed this life (1,104); and on motion of complainant's counsel an adjournment was taken for one week.

(2.) The whole plan and tenor of Mr. Hill's defense, as sworn to by him, is, we believe, such as to explain clearly and without a reasonable doubt, Mr. Kittson's absence from this case as a witness, for the long period of almost six months after Mr. Farley's proofs were closed.

The studied, ingenious and altogether flimsy, though on the face of it, plausible, concoction, from a few distorted truths, of the entire line of defense set up by Mr. Hill, running backward in time to 1873, carefully threading along over dangerous ground, relying upon matters altogether unsubstantial, *mentioning no act done of which any corroborating record could be produced*, concealing all early letters, letter-books, correspondence and written data, and, when produced, having such written evidence tell powerfully and shamefully against him, as in the case of the Upham letters from the Dutch bankers in 1874 (which Mr. Hill swore positively Mr. Upham had shown him in 1874, and which Mr. Upham at last refused to swear he had shown to Mr. Hill)—was a line of action Norman W. Kittson could never be brought to attempt. At any rate he had abundant opportunity and time in which to do so had he felt so inclined.

(3.) To make Mr. Kittson's evidence of any value whatever to the case as set up by Mr. Hill, it would have been necessary for him, face to face with Mr. Farley, to listen to the reading of Mr. Farley's and Mr. Fisher's sworn evidence of conversations with him, on numerous occasions, unequivocally and absolutely made, and for Mr. Kittson to then deny, without the least qualification, statement after statement of

such conversations, and to swear that there was not in such testimony by Mr. Fisher and Mr. Farley, as to the making or recognition of the contract, any word or syllable of truth, as Mr. Hill brought himself to do. (681–698.)

For Norman W. Kittson to have gone upon the stand and admited that any one of the conversations with him by Mr. Farley or Mr. Fisher, looking to or acknowledging Mr. Farley's interest with him and Mr. Hill, would have falsified all that Mr. Hill had sworn to, and would have been worse than useless, *in view of what Mr. Hill had positively sworn to.*

We think, without going into detail, or recapitulating the case set up by Mr. Hill, that these things explain why Mr. Kittson never testified. If the truth had been as Mr. Hill said it was, Mr. Kittson, we believe, would have testified before Mr. Hill did himself.

2.

The court below immediately after finding "defendant Kittson died *before his testimony could be taken*," further found:

"Inasmuch as according to complainant's testimony only four persons were present at the making of the agreement, namely Messrs. Farley, Fisher, Hill and Kittson, the case so far as the direct testimony, rests upon three witnesses, two affirming and one denying; one of those affirming and the one denying being pecuniarily interested and their interests opposed, while the other one affirming has, *so far as appears, no direct pecuniary interest.*"

We are at a loss to discover why the court below made use of the last words quoted, and which we italicize, unless the court believed there was evidence in the record tending in some degree to show that Mr. Fisher had some *indirect pecuniary interest* in the claim made herein by the complainant.

We know of no evidence whatever either to sustain a charge that Mr. Fisher was *an interessed witness*, or to in any way

raise the most remote idea that he had any *indirect, secret* or *contingent interest* in the claim upon which this suit is based. True, Mr. Fisher was an old employe, protege and friend of Mr. Farley, perhaps owing his great success in life to Mr. Farley, in some degree at least,—but aside from the very feeble and quite futile attempt to create a belief that Mr. Fisher was directly or indirectly interested, made by the questions asked him on cross-examination (1,658-60), already shown to the court in this brief, there is nothing in the record in the most remote degree bearing on the subject of an interest by Mr. Fisher of any kind whatsoever in the result of this controversy, save possibly the interest of a deep personal friendship.

3.

The court below having found (as above) that two of the witnesses on the main question of fact were interested, and that the other "has so far as appears, no direct pecuniary interest," further found, that:

"This upon the direct testimony leaves the preponderance in favor of the complainant, but where there is a square contradiction between witnesses of apparent credibility as to a principal fact like this, the solution is not always reached by a process of mathematics, a mere counting of the number of witnesses, but often requires a careful examination of all surrounding circumstances."

We have no disposition to question the soundness and correctness of the views of the learned court below, as expressed in the last quotation. Nor have we any disposition to question the next clause of the opinion delivered against the complainant below, viz:

In this case inquiry must be directed to the inherent probability, under the circumstances surrounding the parties, of the making of such an agreement; to the conduct of the parties prior and subsequent to that time; to any contradictions and supports which their respective stories may receive from

other and undisputed facts, and to any statements oral or written inconsistent with their direct testimony.

We respectfully submit that the record in this case shows the inherent probability under the circumstances surrounding the parties, of their making the agreement set out in the bill herein, and also the inherent improbability of the denial that is set up by one witness as against the affirmation of two other witnesses; and the inherent improbability of the explanation, in effect, that there was no cause or motive impelling the witness who stands alone, to enter into such agreement.

We believe the court below erred in reaching the conclusion upon the evidence in this case, that the probabilities, all things considered, are in favor of the story told by the defendant, Mr. Hill. Having confidence in this belief, we have in the foregoing brief endeavored to point out more clearly and understandingly than perhaps was done in the court below, the situation and surroundings of the parties to this case.

We believe, rightly viewed, there is no improbability in the story told by complainant, and that the story told by the defendant, Hill, is highly improbable in all those important aspects in which it disagrees with the statement of the complainant.

As stated by the court below, "the testimony is voluminous," "it is not pretended that there was any written contract,' and Mr. Farley and Mr. Fisher "testify that at an interview which lasted about two hours, the agreement was entered into and its terms fixed." And

"Inquiry naturally runs, in the first place, to the situation of the parties and the subject-matter of the agreement, at the time it is claimed to have been made, and the probabilites in view of such situation of the parties entering into such an agreement."

4.

The principal grounds upon which the court below found for the defendants on the proofs and probabilities, as we understand the opinion of the court, are and will be commented upon by us, with great deference, as follows:

I.

The improbability that a man situated as Mr. Farley was in 1876, would voluntarily and deliberately enter into such a contract.

The court points to Mr. Farley's then age—past sixty years—his long and active business experience, his having had "important trusts placed in his hands," and having "so managed those trusts as to win the confidence of those so placing them," his duty to "preserve the property in his hands" as receiver, and so manage it "as to make it as productive as possible," and so that it should "realize as much as possible for the bondholders." The court asks whether it is possible that a man so situated would enter into a secret arrangement with third parties for the purchase of the bonds, which would make it for his interest to reduce the market of the bonds, whether such a man would deliberately cloud the record of his life and burden the discharge of his official duty with the adverse, potent and pressing weight of private pecuniary interest. And the court further asks whether it would be believed, even if two witnesses swore to it, and he alone denied it. The court lays stress upon the conflict which such a contract produces between duty and private interest.

(1.) We most respectfully submit that there are numerous decisions by this and other courts of the highest authority, hereinafter cited, holding that contracts of the nature set up in this case, in the absence of actual fraud, are not void, but

only voidable, at the election of the *cestuis que trust;* and that in this case there is no evidence whatever upon which to base the slightest notion or belief, that any bondholder or person interested in the railroad properties in question was a loser in the slightest degree, directly or indirectly, by reason of the interest that Mr. Farley had in the purchase of the bonds. There is not a scintilla of evidence that there was any fraud whatever, or any wrong doing in the premises, but every reason to believe from the evidence that Mr. Farley's connection with the purchase was a blessing to the bondholders, and that they got more for their property because he was so interested, than they would otherwise have received. We think the record is full of evidence from which this conclusion may be clearly drawn.

As specimens of that indisputable evidence, we refer to Mr. Carp's first report in 1873, where he urges so strongly on the bondholders that they complete the lines, and receive receiver's certificates therefor.

Mr. Carp said (472–3):

Certificates being a prior lien on the property, and as every dollar which is put into the road increases *its value* considerably, there cannot be the slightest fear of losing anything even at a foreclosure.

But what gives me moreover a great confidence in these certificates, is the personality of the receiver. Although the receiver is an officer of the court, who is directly responsible for all his actions, for all contracts made by him, for his expenditures, etc., to the judge who appointed him, whilst he also had to give a bond in the sum of $100,000—yet all these stipulations for safety do not compare with the personality of a man like Mr. Farley, who unites profound knowledge of railroad building in the west of America, and economy of management with unalterable honesty and good faith. It is my positive conviction that every dollar which shall be expended by Mr. Farley will be expended usefully and well. It may appear strange to many that a loan which combines so many guarantees with such a high rate of interest did not find ready takers in America.

While the proposition of January 29, 1877, was pending, offering $3,500,000 for the railroad lines, and while Mr. Carp was at New York in consultation with Kennedy & Co. thereon, Mr. Carp wrote Mr. Farley the following letter (278–9):

41 CEDAR STREET, NEW YORK, Feby. 25th, 1877.

J. P. Farley, Esqre., St. Paul:

DEAR SIR. I learned yesterday from Messrs. Kennedy the contents of your telegraphic message regarding the signature by the governor of the deeds for 753,000 acres of lands, and I beg to express to you by these few lines the great satisfaction I feel from this important result, and at the same time I want to offer to you, as well in the name of the committee as of the Dutch bondholders, their hearty thanks for all the pains and efforts you spend to protect their interest.

It will be superfluous for me to repeat to you how highly I appreciate your services, and I know to express the feeling of all interested parties in these companies by expressing the hope that you may be willing to continue the management of the property for many years.

With much regard, I remain, dear sir, yours very truly.

J. CARP.

While the second proposition of May 26, 1877, was pending, Kennedy & Co. wrote Mr. Farley as to the reasonableness and fairness of the figures offered in that proposition for the bonds, as follows:

"(Confidential.)

NEW YORK, June 27th, 1877.

J. P. Farley, Esq.

DEAR SIR: Your favor of 22d duly received, which is very satisfactory as regard the position of Kittson & Hill. We could not understand that apparent alliance.

Mr. Hill has been here for several days, and we have discussed at length the propositions of himself and Kittson made to the committee, and which they have referred to us. Our views of the value of the 286 miles of road, First division, is that in ordinary times, and under such management as yours, they should earn about $400,000 net, with a fair prospect for increased business, particularly after building the cut-off. This would be seven per cent. upon $20,000 per mile. Kittson's and Hill's offer is about $13,000 per mile for the First division

lines, although they bid only for the bare majority of the bonds which, if they carried the road, would make the offer about $10,000 per mile. We are inclined to advise our friends to take the matter into consideration, and have mentioned prices which would, in our opinion, be more in accordance with our ideas of the value of the property, although it cannot be expected that parties will buy these bonds except with a pretty sure prospect of a large profit; and except these Canadians, there would not be found persons ready to give any such sum in these times as is now offered." * * *

Other evidence to the same effect might be quoted,—but we forbear.

(2.) The interest held by Mr. Farley in the shares of the contingent profits coming to Kittson and Hill, was known to the agents of the bondholders before the purchase was concluded, and those agents approved of his having such interest and expressed their gratification on learning the fact. They expressly wrote him that they should have great confidence in the future success of the enterprise, if he continued his connection therewith. (February 27, 1878, 994; February 25, 1878; 317. Finding of this court on the plea; 120 U. S., 303).

(3.) As Mr. Farley's motives and conduct were sound, moral, and honest in every respect, we are unable to see that there was anything to be ashamed of in his entering into the agreement to assist in the purchasing of the bonds, as the parties selling, through himself, and their able, astute and vigilant agents, knew as much about the elements and contingencies upon which the value of the property depended as he did, and were hence as good judges as he was of its real value.

(See letter of Kennedy & Co. to Mr. Farley, June 27, 1877; 289–290).

The Dutch committee and bondholders were perfectly satisfied with the prices offered for the bonds in the second prop-

osition of May 26, 1877, which prices were repeated in the third proposition of January, 1878, and, finally, were glad to sell them on the credits and terms contained in the agreement of March 13, 1878.

Mr. Carp's taking a commission for Mr. Farley to buy some bonds (about $20,000 worth) for him in Holland, shows there was nothing in Mr. Carp's mind that would have led him to object, any more than did Kennedy & Co., to Mr. Farley's being personally interested with those who were trying so hard to fix up a basis upon which to relieve the Dutch people of the great white elephant they had on their hands in Minnesota. Had Mr. Carp been told Mr. Farley was back of the offer by Kittson and Hill, Smith and Stephen, no doubt he would have been delighted and encouraged beyond measure; and would no longer have had the great fear he entertained for a good while that the scheme was all wind.

All the facts and circumstances being taken into consideration, we are not able to see that the improbability stated by the Circuit court, under this head of the opinion, is against Mr. Farley's having accepted an interest in the purchase of the bonds.

II.

The improbability found by the Circuit court of Mr. Farley's having an agreement for a share with Kittson and Hill, growing out of the fact that Mr. Farley was not to furnish any money.

(1.) The evidence is as clear that Kittson and Hill were not to furnish any money as it is that Mr. Farley was not to furnish money. Further than that, the evidence is equally clear that Smith and Stephen were not expecting to furnish any money, beyond quite minor advances. They did expect to pledge their credit of course, but felt perfectly safe in doing

so, as long as the purchased bonds and railroads were to be the real basis of security. All through the negotiations of 1876 and 1877, the thing depended, *in fact, on Mr. Stephen being able to interest capitalists in Europe, to the extent of £800,000 sterling*. That effort was a dismal failure as already shown.

The next effort, the successful one, was to get the bonds on time. Turning to the written agreements of January 21, 1878, and March 27, 1878, between Stephen, Smith, Kittson and Hill, for the division of their interests (915; 1,268), it is seen that all any of the parties agreed to do was to become personally responsible for the advances necessary. In the first agreement it was provided (916):

> Having full confidence in each other and in the success of said enterprise we hereby *mutually agree to become responsible for the repayment of all moneys required* to be advanced to us in carrying out said purchase (if said offer be accepted) and *to join in the execution of any papers or securities which may be required* in obtaining such advances.

In the second agreement it was likewise provided (1,269):

> And we further agree to become jointly and severally, and we do hereby become jointly and severally responsible for the payment of all moneys required to be advanced at any time in the prosecution of said enterprise, and for the full and entire performance of our agreement with said Dutch Committee according to its terms and conditions, and that *we well jointly and severally execute and deliver all notes, bonds or other securities* which it may be necessary to execute from time to time, to procure any loans or advances required to be obtained in the prosecution and completion of said enterprise, it being understood that as between ourselves we are liable in equal shares.

Then follows the clause giving the survivors, in case any associate should die, the right to buy the interest of the deceased for $75,000, together with a refund of "all sums of money which such deceased shall have advanced during the prosecution of this enterprise in aid thereof, including per-

sonal expenses for which he may not have been reimbursed," with interest. (1,270.)

So far as the record shows, all the money used, aside from that procured on the new bonds after reorganization, and aside from that obtained to build the extensions (on the credit of the debentures which would be coming back to refund advances for that purpose), was advanced on the joint notes of Smith, Stephen, Kittson and Hill. If there is any exception shown by the evidence to that statement as to finances, saving that shown in the letter of Stephen to Hill, of the late date November 2, 1878 (922), referring to a remittance to be made to the bank in New York of some notes, and "$75,000 to be sent to-morrow," we do not now recall it.

Whether that $75,000 was money of the Kittson Boat Company, the stock of which was taken in by the syndicate under the agreement of March 27, 1878 (1,271), or private funds of Kittson and Hill, the record does not disclose so far as we now recall.

ADDENDUM: At top of page 636 Mr. Hill says this $75,000 was taken from the treasury of the Steamboat Company.

Hence we cannot see why it should be considered improbable that Mr. Farley should have had in 1876 exactly the understanding he testified to, with Kittson and Hill, on the subject of finances.

It should be borne in mind that the bonds held by the Dutch Committee were, under the final agreement of March 13, 1878, bought upon a credit, and were not to be paid for, and were not paid for until after the foreclosure sales and the organization of the new company.

III.

The improbability found by the Circuit court, of Mr. Farley's having an agreement etc., etc., based upon the evidence that Mr. Hill and Mr. Kittson had in progress, before 1876, a scheme to buy the bonds, etc.

As to this point we shall not attempt to even recapitulate the evidence, which makes, as we believe, strongly against the the probability *that there was any prior scheme*, save that embraced in the Delano figuring and plans pertaining to the Branch Line, and the company organized by Mr. Delano, with Kittson and Hill as directors, in furtherance of that Delano project.

We cannot see that Mr. Farley's and Mr. Fisher's versions of affairs in 1874 and 1875, or anterior to 1876, are "most absurd," as the court below seemed to consider them. We have in this brief collated the evidence on this point at considerable length, and respectfully refer to our argument on that subject.

IV.

As to the mere errors in the recollection of dates by Mr. Farley and Mr. Fisher (afterwards frankly admitted and corrected), upon which the court below laid much stress in the opinion, we shall feel compelled to refer to our comments thereon in this brief under the proper periods in which those incidents occur. It seems, however, not improper to remark that if the views of the court below, as to errors in dates, were applied to the witnesses for the defendants, their veracities would stand under a condemnation, far more severe than that meted out to complainant and his witnesses. It would be tedious to select instances and point out the materiality of such discrepancies in the testimony of defendant, Hill and his witnesses.

V.

We believe we have fully pointed out that Mr. Farley never claimed to have had an agreement with Smith and Stephen, and that those parties, with Kittson and Hill, went on with their project, till the bonds were practically bought in 1878, before *they* entered into a written agreement for division of their shares. Hence, the fact that Mr. Farley's agreement was not in writing, considering the turn affairs took about January 1878, should not be regarded as strange, nor as raising an improbability of such interest existing.

VI.

The finding of the court below, that

[1.] Neither the Dutch Committee nor their agnents knew that he was or claimed to be an associate.

And further:

[2.] Messrs. Smith and Stephen actively engaged in the negotiations, frequently communicating with Hill and Kittson with interests as between themselves understood, and finally settled by contract in writing, neither knew or suspected that Mr. Farley was in any way interested; * * *

We will only here comment upon, by pointing out again:

1st. The positive written evidence, and the finding upon the plea (120 U. S. 303), to the contrary of the first above conclusion of the court; and

2d. We again point to the fact that neither Smith or Stephen would swear they had no notice, knowledge or intimation that Mr. Farley was interested with Kittson and Hill.

They only testified upon that point in a vague, uncertain way, as that they had no recollection of its being mentioned to them.

VII.

As to the letters by Mr. Farley, at the close of affiairs, —or the final rupture—in which substantially, Mr. Farley indicated his willingness to accept whatever share Mr Kennedy would say was right,—and which letters with all their poor grammar and worse orthography, the court below spread upon the face of the opinion, we must leave to the consideration of this court, with the following remarks submitted with great respect to the court below.

1st. The court took the first letter of February 22, 1878 (1,009), to have been written February 22, 1879, though it was in reply to that letter that Kennedy & Co. wrote Mr. Farley two letters, each approving of his having an interest with Kittson and Hill (317, 994); and though the evidence taken on the plea settled the fact that after that letter was written, Mr. Farley at New York, informed Mr. Kennedy fully of his interest with Kittson and Hill, and received Mr. Kennedy's entire consent thereto.

2d. The letters of 1879 are rather severe in their tone as to Mr. Hill, and betray a natural feeling of indignation and resentment at the outcome of affairs; but, when translated into good English and correct orthography, they show Mr. Farley was looking for no "bonification," but an equal interest with Kittson and Hill, though not an equal interest with those parties who had made no agreement with him.

After February, 1878, there appear to have been no letters from Mr. Farley to Kennedy or Barnes, relating to his interest with Kittson and Hill, until the extensions had been completed, and the new company was about to be organized.

In the month of May, 1879, a series of three letters bearing on that subject were written. We take the liberty of correcting the spelling and orthography of Mr. Farley's two letters, and of showing the series of letters in their order, as follows:

The first letter of Mr. Farley to John S. Barnes is not in the present record, except as it is made a part of an answer (1,751) by Mr. Kennedy (in his Sahlgaard deposition, introduced by complainants' counsel, to show Mr. Kennedy's poor memory (1,740). As thus set out, apparently not dated, the letter is (transcribed by us), as follows:

John S. Barnes, Esq.:

Since the election of Bigelow and Galusha as directors in the new company—men of no money, railroad experience or influence—and myself left out in the cold, I am forced to the conclusion that my time and claims on the St. Paul and Pacific are short. I did expect better things of Hill and Kittson.

I had a talk with Jim Hill last night; he disclaims any intention, on his part, to ignore my claims; but he is such a liar—cannot believe him.

It is a matter of astonishment to every person in St. Paul to see the way Jim handles Mr. Stephen. He is *notoriously* known to be the biggest liar in the state.

Mr. Kittson has told me, time and again, that Jim Hill was the worst man he ever saw. Upham, Kelly, Thompson, and, in fact, every citizen in St. Paul, *if they would speak their sentiments*, would all tell the same story.

You must not blame me if I should try to get even with Jim Hill before I leave here. Yours &c.,

J. P. FARLEY.

The opinion of the court below states the date to be May 23, 1879 (1783); but we have failed to discover from what portion of the record that date is obtained.

The next letter is from Mr. Kennedy, (322):

NEW YORK, 26th May, 1879.

J. P. Farley, Esq., Receiver and General Manager, St. Paul, Minn.

DEAR SIR: I am in receipt of your favor of 22d inst.,

and have received the remittances you refer to, for which I am obliged, and would be glad to have the others which you promise in a few days. I leave for the west to-morrow night, via Montreal, and hope to be with you next Saturday. I have to send out about $2,000,000 of bonds, which I will send by two special messengers, leaving here Wednesday night. I will join them at Chicago. Please get passes from the C. M. & St. P. Co., for Ed'd B. Babcock, and one from Chicago to St. Paul and return, and forward them to Edward B. Babcock, Grand Pacific hotel, Chicago, so that he will get them there on Friday, in good time to come up with me in the train from Chicago on Friday night, and oblige yours very truly, JOHN S. KENNEDY.

P. S. If it is not riding a free horse to death, I will be glad if you could send down the business car for us to Chicag; but, if you think we have been overdoing that sort of thing, never mind, and I will come up with the two special messengers in the regular sleeper. J. S. K.

The last letter of the series, was written by Mr. Farley to Mr. Kennedy, in answer to Mr. Kennedy's letter to him. We transcribe it thus, (1492-3):

ST. PAUL, May, 29th, 1879.

J. S. Kennedy, Esqr.:

Your letter, 26th, reached me this morning. Fortunately we had just made arrangements to send the car to Chicago with Mr. Smith and Lord Elveston. I hope it will reach there in time for you and your party.

Pressing business compels me to be absent a few days.

I have had some sharp talk with Mr. Hill. If he persists in his present course, to ignore all my claims to share in the *honors* or *profit*, to some small degree, he may have cause to regret it.

I hope to be back early next week. Yours &c.

J. P. FARLEY.

Mr. Farley's own explanation of the language he used in his letter to Mr. Kennedy of May 29, 1879 (D. Ex. 141, 1,492-3), "all my claims to share in the honors or profit to some small degree," we think is very reasonable.

He testified (1,402):

A. Mr. Hill's disposition (from what Mr. Kittson had previously told me) to put this thing off, looked to me very much as though he didn't intend to do what he agreed to. I called his attention to the fact that I couldn't see the necessity of waiting for Mr. Stephen or Mr. Kennedy. And another fact was, that I learned from Mr. Hill in that interview that other parties had come into this scheme, you know, and as a matter of course, I was always in favor of dividing it up into smaller parts than he was willing to—by fifths—and at that time I felt that I was willing to be governed by whatever was right under the circumstances—what Mr. Kennedy might think was right.

VIII.

The court below considered the fact that Mr. Farley put an end to Mr. Hill's contracts (or that of his firm) for handling wood, lumber and freight for the First Division Company, on assuming the management of that road in 1876, as an item of evidence making against Mr. Farley's claim that he agreed to join a syndicate including Mr. Hill. The court held:

It is inconceivable that Mr. Farley, having entered into or proposing to enter into an agreement with Messrs. Hill and Kittson for the purchase of these bonds, should cancel contracts supposed to be beneficial to one of his associates.

The contracts in question were generally condemned and execrated by the citizens of St. Paul, and were even made the basis of threats to forfeit the First Division Company's charter.

(See the Kennedy bill, filed July 26, 1873, sworn to by John S. Barnes, and containing severe allegations as to the contracts

with Hill, Griggs & Co., and the mismanagement of the First Division property. 855, 856.)

We are unable to see the force of the argument or point stated in the opinion, that Mr. Farley probably did not have an agreement with Norman W. Kittson and James J. Hill, to negotiate through Canadian capitalists for the financial means, and then with the Dutch holders for their bonds, with the object of acquiring the railroad property,—which point is based on the fact, substantially, that Mr. Farley, simultaneously with, or contemplating the agreement, refused to allow one of the associates to longer wrong the property intended to be acquired.

The putting an end to the Hill, Griggs & Co. contracts with the First Division company in 1876, was a necessity, as it seems to us on the evidence,—

1. Because the contract was oppressive, extortionate and jeopardizing the charter of the company.

2. Because the court would doubtless have ordered it canceled on the application of any one interested.

3. Because if the contract wronged the property, diminished it and wasted it, to longer allow its continuance would have been an actual fraud on the bondholders.

4. An actual fraud on Mr. Kittson's prospective interests.

5. A gross and repulsive abuse of the confidence about to be sought from Stephen, Smith and other capitalists, at home or abroad, whose money would have to be invested in the bonds on the strength of the security the property was capable of furnishing.

6. Not to have ended those nefarious contracts, would have stamped the management of the First Division property under Mr. Farley as general manager, with all the bad symptoms of the former management, and doubtless would have falsified the assurances made by Mr. Kittson to Mr. Smith, that Mr. Farley's able, laborious and thoroughly honest man-

agement of the property, would make the enterprise safe and reliable in every respect.

7. Mr. Farley's own prospective interests would have suffered.

Had Mr. Farley failed to cancel the contracts in question and all private contract relations held by Mr. Hill and his firms with the First Division Company, on taking charge in 1876, he would have been blind to that duty which he owed to the property, and to the bondholders; and would have impaired to that extent, the respect and confidence of all parties concerned—probably that of Mr. Hill included.

We most respectfully submit, that while there are plenty of men who would at once yield to the temptation the court below has pointed out concerning Mr. Hill's profitable contracts, and who would, because interested with Mr. Hill in a different undertaking, have allowed him to go on with his said objectionable arrangements, the record in this case, we think, shows J. P. Farley was not that kind of a man.

We must say further that there is nothing in the record to show that Mr. Farley ever held such respect for, or entertained such fear of Mr. Hill, as to call for the remarks of the court below, as follows:

> If he thought the contracts were injurious to the company's interests, his interest in the purchase of the bonds at as low a price as possible would have compelled a continuance of the contracts with whomsoever they were made. And his new relations with Mr. Hill as an associate would in like manner tempt to forbear offending him by canceling so beneficial a contract.

Mr. Kittson was the man who influenced Mr. Farley to join the enterprise.

IX.

In conclusion, we shall notice the last point made in the opinion of the court below—or rather the finding of the court on matters of fact, as follows:

(1.) Very likely many of the things testified to by Messrs. Farley and Fisher were said by Messrs. Hill and Kittson to them. Their business relations were such that they were often brought in contact, and doubtless had frequent conversations, but I doubt not that whatever they have truthfully said were the gathered fragments of many talks, mere *disjecta membra*.

(2.) I cannot believe from the testimony that at any time the complainant and the defendants had that full distinct talk which complainant and Mr. Fisher testified to, or that there was ever a definite coming together of the minds of the parties in reference to an agreement for the purchase of these bonds.

(1.) As to the finding that very likely many of the things testified to by Farley and Fisher *were said by Hill and Kittson to them*—we suppose the court referred to the conversations bearing directly or indirectly upon Mr. Farley's being or becoming interested pecuniarily with Kittson and Hill in the purchase of the railroad bonds in question. If that be the meaning of the words used by the Circuit court, then we must call the attention of this court to Mr. Hill's positive, sweeping and entirely unqualified denial, under oath, of each and every part, and of each and every one of the conversations bearing directly, indirectly, or in any manner whatever, upon the subject of Mr. Farley's becoming or being in any degree whatever pecuniarily interested with Kittson and Hill in the purchase of the bonds in question. Mr. Hill's counsel in the court below carefully and laboriously culled out from the record every scintilla of evidence of the nature last referred to, and read the same to Mr. Hill, and he point blank denied all of it. (681, Q. 584 to 641, p. 698.)

(2.) As to the latter clause of the finding, last above quoted,

we can only say that if this court finds from the evidence that there was at any time any talk between Mr. Farley, Mr. Kittson and Mr. Hill on the subject last referred to, in which it was proposed, suggested or agreed, that Mr. Farley, Mr. Kittson and Mr. Hill, should, become jointly interested in the purchase of the bonds in question, such conclusion of the court, as it seems to us, must also carry the further conviction that the testimony of Mr. Hill on that subject is entirely untrue, and that, therefore, the clear weight and preponderance of the evidence and proofs is with the complainant, and consequently that the decree of the court below is erroneous and ought to be reversed.

Having fully stated the issues, and the evidence so far as material, and having briefly pointed out wherein we think the court below erred in its finding of the facts, and that the court did not pass upon the legal points raised, we shall conclude by stating the points and authorities upon which we rely to sustain the complainant's case.

PART III.—THE LAW.

POINTS AND AUTHORITIES.

INCOMPETENT EVIDENCE WAS RECEIVED FOR DEFENDANTS.

1. All of the testimony of defendant Hill, and of the witnesses Upham, Galusha, Newell, Smith and Saunders, as to statements made by Hill to, and conversations by Hill with them, they being third persons, not in the presence of complainant, was specifically objected to when given, and was manifestly incompetent, immaterial and inadmissible.

It would seem unnecessary to cite authorities to the point that a party can not prove that he entertained a given scheme in a certain year, or entered into a certain agreement at that time, by producing witnesses who will testify that on or about the time mentioned, he told them he entertained such scheme or had entered into such agreement. But the case of *Wallace* v. *Story*, 139 Mass. 115, is so clearly in point that we cite it as conclusive of this branch of the case at bar.

That was a bill in equity, filed to restrain a foreclosure sale of real estate and to redeem.

The plaintiff testified that soon after the restraining order was served on the defendant, she met the defendant in his office at his request, and they then agreed that the defendant should continue to occupy the premises, at an annual rental equal to the interest on the mortgages, and the bill be discontinued; and that at the end of the interview she went to the office of her attorney of record, and reported to him this interview and agreement. Her attorney was allowed to testify *de bene* that after the injunction was obtained she reported to him that she "had seen the defendant and made an arrangement with "him whereby the thing was to remain and nothing more was to be done."

The court below excluded the testimony as evidence of the agreement. The decision of the Supreme court is very brief:

"By the court: The statement of the plaintiff to her counsel, that she made an agreement with the defendant, after he had entered to foreclose, that he should occupy the premises as her tenant, made in the absence of the defendant, was not competent to prove that the alleged agreement was made, or to corroborate the plaintiff's testimony, or to meet the argument that her statement on the stand was fabricated. It was made after the alleged agreement and was no part of it. It was mere hearsay, and was rightly ruled to be incompetent for either of the purposes above named. *Hodgkins* v. *Chappell*, 128 Mass. 197. *Somers* v. *Wright*, 114 Mass. 171. *Lucas* v. *Trumbull*, 15 Gray, 306."

Wallace v. *Story*, 139 Mass., 115.

2. John S. Kennedy's testimony as to matters passed upon by the Supreme court in its decision on the plea, was entirely incompetent and inadmissible.

Under the pleadings and stipulations before the court below on the hearing on the plea, the only issue of fact to be determined by the court was whether complainant ever informed John S. Kennedy, or any of the bondholders, of his interest in the project of purchasing said bonds and thereby acquiring said mortgaged property; and whether Kennedy or any of the bondholders ever knew, suspected, were informed or believed, at any time until after the confirmation of the foreclosure sales, that complainant claimed such interest. The lack of such information, knowledge, suspicion or belief was affirmatively set up by said plea and the burden of proof was on said defendants to prove the same.

The only evidence introduced by either party upon this issue of fact, was the testimony of complainant, taken by stipulation March 15, 1882, and certain orders, bills of complaint and proceedings in the cause of *John S. Kennedy et al.* v. *The Northern Pacific R. R. Co. et al.*, all of which are set forth in the record afterward filed in this cause in this Court, upon the former appeal.

On the fifteenth day of July, 1882, the court below entered its decree, hereinbefore recited, sustaining the pleas of the defendants, and dismissing the bill of complaint.

Thereupon the complainant prayed, was allowed, and afterward perfected his appeal from said decree, to the Supreme court of the United States, and such proceedings were therein afterward had that said appeal came on to be heard at the October term, A. D. 1886, of the Supreme court, and after argument of counsel and due consideration by the court, the decree of the court below, of July 15, 1882, was reversed. And the Supreme court, upon the only issue of fact arising on said plea, expressly decided as follows:

"The averments in the first part of the plea, re-stating in detail some of the facts alleged in the bill, were admitted by stipulation of counsel, in writing, to be true, and no controversy arose upon them.

"The substance of the averments in the second part of the plea was, that neither Kennedy nor the bondholders, whose agent and representative he was, had any notice or knowledge that the plaintiff had, or claimed to have, any interest in the project set forth in the bill until after the sales of the railroads under decrees of foreclosure. The matter of fact thus averred was put in issue by the replication. The testimony of the plaintiff (in connection with Kennedy's letter to him), which was uncontradicted, and was the only evidence upon the matter pleaded, shows that Kennedy, before the completion of the sale and purchase of the bonds, knew that the plaintiff was to have an interest in the project, although he may not have known the extent of that interest or that it had been already acquired. The want of notice to Kennedy and the bondholders, averred in the plea, is thus disproved."

(*Farley* v. *Kittson et al.*, 120 U. S., 303.)

We, therefore, claim and insist that thereby the only issue of fact joined on said plea was determined in favor of complainant; that by reason thereof the Supreme court reversed the decree of the court below, and remanded said cause, with directions to overrule the plea and to order the defendants to

answer the bill; that all controversy as to the truth of the disputed matters set up in the plea has been set at rest and finally and conclusively determined against the defendants; and that the decision of the Supreme court of the United States thereon is *res adjudicata.*

Townsend v. *Townsend*, 2 Paige, 413.
Bangs v. *Strong*, 4 N. Y. Rep. (Comstock), 315.
Dows v. *McMichael*, 2 Paige, 344.
Dows v. *McMichael*, 6 Paige, 139.
Peay, Receiver, v. *Duncan*, 20 Ark., 85.
Lucas v. *City of San Francisco*, 28 Cal., 591.
Cole et al. v. *Clarke*, 3 Wis., 323.
Rector v. *Danley*, 14 Ark., 305.
Reybold v. *Dodd's Admr.*, 1 Harr. (Del), 412
Hoge v. *Norton*, 22 Kas., 374.
Comrs. of Wilson Co. v. *McIntosh*, 30 Kas. 234.

THE EFFECT OF COMPLAINANT'S BEING CALLED AS A WITNESS FOR DEFENDANTS.

Jesse P. Farley, the complainant, was called and testified.

After the cause had been redocketed and the answer of the defendants had been filed, and issue joined thereon, the complainant, in proving his case in chief testified as a witness in his own behalf. He was examined by his counsel, fully cross-examined by defendants, and afterwards examined on re-direct.

After complainant had closed his proofs in chief, the defendants, in the course of putting in their evidence, called the complainant as a witness.

He was examined by defendants counsel, cross-examined by

complainant's counsel and examined on re-direct by counsel for defendants.

This was after the death of Norman W. Kittson had been suggested on the record, and an order had been entered substituting his executor, The St. Paul Trust Company, as a party defendant. And the complainant was called as a witness by counsel for the defendants, including said executor, in conformity with the provisions of Sec. 858 of the Revised Statutes of the United States.

Among the letters introduced on Mr. Farley's first examination on his own behalf, were three letters from John S. Barnes, of June 9, 1876 (Complt.'s Ex., 87), of June 19, 1876 (Complt.'s Ex., 89), and of December 18, 1876 (Complt.'s Ex., 108). Of neither of the letters to which these exhibits were replies, did complainant keep a copy. On his first examination complainant testified that he though these letters referred to the building of the Breckenridge-Barnes cut-off. He might well have thought so, as, in the absence of the letters to which they were replies, these exhibits were obscure and might be construed as relating to that subject, as well as to the subject of the general plan for the purchase of the bonds or railroad lines.

Upon calling Mr. Farley to the stand as a witness in their behalf, counsel for defendants, with complainants' letter of June 3, 1876, to which Barnes' letter of June 9, 1876, was a reply, in his pocket, and without disclosing it, proceeded to cross-examine complainant about the last mentioned letter, with no other purpose than to strengthen him in his mistaken view that it related to the building of the Breckinridge-Barnes cut-off; and then by springing on him his letter of June 3, 1876, to confuse his mind and involve him in contradictory statements. Substantially the same course was taken by counsel in regard to the letters of Barnes of June 19, 1876 (Complt.'s Ex., 89), and of December 18, 1876 (Complt.'s

Ex., 108). This was done solely with a view to entrap the witness and afterwards to discredit his testimony. Of course, with nothing to refresh his memory, Mr. Farley reiterated his former recollections.

Upon being further examined the following day, while still on the stand as defendants' witness, complainant called for the letters which he had not been permitted to read the day before, and on looking them over carefully, corrected his testimony, and stated that he had been mistaken as to the proper construction of these letters and that he must have been mistaken as to the date when the combination and agreement was entered into between Kittson, Hill and himself, and that the date was earlier than he had believed when giving his former testimony.

He based this correction upon his own letters, now, for the first time shown him, some twelve years after they were written.

The mistakes which complainant made in construing these letters, were mistakes against his own interest. The letters, which he was disposed to think related to the building of the "cut off" and not to the enterprise of purchasing the bonds, furnish really the strongest evidence of complainant's connection with, and early active co-operation in the first negotiations of Kittson and Hill for the purchase of the bonds, aside, of course, from the positive oral testimony of the complainant and Mr. Fisher.

This cross-examination by counsel for defendants of a witness produced by them, was objected to at at the time, and was manifestly illegal. All the authorities are clear that counsel are not at liberty to cross-examine their own witness with a view solely to entrap, deceive and confuse him, and to discredit his testimony.

1 Greenleaf Ev., Secs. 442, 444, and cases cited.
Note a to Sec. 444, 1 Gr. Ev. by Judge Redfield.

Having called and examined complainant as their own witness, the following consequences result: (1.) The defendants are bound by the statements of the witness, except as they have proven the contrary thereof by other evidence, and they can not impeach him by evidence or argument. (2.) The cross-examination by complainant's counsel, being on matters inquired of on the direct examination, was proper and admissible. (3.) The testimony of complainant both on direct, cross and re-examination, as to statements by and transactions with Kittson, deceased, were proper and admissible, complainant having been called upon to testify by counsel for the executor according to the provisions of Sec. 858 of the Revised Statutes of the United States.

It may be contended that complainant was not called as a witness under Sec. 858 aforesaid, but under the statute of Minnesota, approved March 7, 1885.

To this we answer:

(1.) The record shows the contrary. Complainant was not called for examination as if under cross-examination under the Minnesota statute; but directly as a witness for all the defendants, one of them an executor, which could only lawfully be done under the provisions of Sec. 858 aforesaid. (Rec., 1,349, 1,425, 1,441, 1,472.)

(2.) The Minnesota statute has no application nor binding force upon the practice in United States courts sitting in equity.

Section 34 of the Judiciary Act of 1789 (Sec. 721, R. S. U. S.), which provides that the laws of the several states shall be regarded as rules of decision in the United States courts, is expressly limited to "trials at common law." The decisions of the Supreme court are uniform to the effect that "the language of the section can not, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity."

U. S. v. *Reid*, 12 How., 361.
McNeill v. *Holbrook*, 12 Peters, 84.
Sims v. *Hundley*, 6 How., 1.
Smyth v. *Strader*, 4 How., 420.
Vance v. *Campbell*, 1 Black, 427.
Wright v. *Bales*, 2 Black, 536.
Ryan v. *Bindley*, 1 Wall., 66.
Bucher v. *Cheshire R. R. Co.*, 125 U. S., 555, 582.

(3.) The laws of the several states, as to evidence and procedure, are regarded as rules of decision in the United States courts only where the constitution, treaties or statutes of the United States do not "otherwise require or provide."

Potter v. *National Bank*, 102 U. S., 163.
King v. *Worthington*, 104 U. S., 44.
Ex parte Fisk, 113 U. S., 713.

In the case last above cited the Supreme court decided that a statute of New York relating to evidence and procedure, which permits a party to the suit to be called as a witness and subjected to examination at the instance of the opposing party in advance of the trial, has no validity or binding force in the United States courts sitting in New York even in an action at law.

Mr. Justice MILLER, in delivering the opinion of the court, said:

"The case before us is eminently one of evidence and procedure. The object of the orders is to procure evidence to be used on the trial of the case, and this object is effected by a proceeding peculiar to the courts of New York, resting alone on a statute of that state. There can be no doubt that if the proceeding here authorized is in conflict with any law of the United States, it is of no force in the courts of the United States. We think it may be added further in the same direction, that if Congress has legislated on this subject, and

prescribed a definite rule for the government of its own courts, it is to that extent exclusive of any legislation of the states in the same matter."

Ex parte Fisk, 113 U. S., 713.

(4.) It has also been expressly held by the Supreme court that in Sec. 858, R. S., Congress passed a general act governing the subject of the competency of parties to the record, and interested parties as witnesses in a cause, and the qualifications to their general competency, the mode whereby they may be called and the manner of their examination, which supersedes any and all state legislation on that subject so far as concerns proceedings in United States courts.

Ex parte Fisk, *supra.*

Conn. Mut. Life Ins. Co. v. *Schaefer*, 94 U. S., 457.

In the case last above cited, which was an action on a policy of life insurance, Mr. Justice BRADLEY, delivering the opinion of the court, said:

"The first exception was for overruling certain testimony offered by the defendant. The plaintiff having offered herself as a witness, on her cross-examination admitted that she had employed one Harris as her attorney to file her petition for divorce; and being questioned whether she had not stated to him, to be embodied in the petition, that Schaefer had been an habitual drunkard for a period of more than three years prior to the date of filing the petition, denied that she had so stated to him. (Had such been the fact it would have falsified the statement made in the application for insurance.) The defendant called Harris and asked him whether the plaintiff had not so stated to him on that occasion. The question was objected to and overruled, as calling for confidential communications between attorney and client. The defendant alleges that herein the court erred, because by the law of Ohio, such communications are not privileged. An examination of the Ohio statutes renders it doubtful whether the law is as the defendant contends. But if it were, the court did right to exclude the testimony. The laws of the

state are only to be regarded as rules of decision in the courts of the United States, where the Constitution, treaties or statutes of the United States have not otherwise provided. When the latter speak, they are controlling, that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for Congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and where Congress has declared the rule, the state law is silent. Now, the competency of parties as witnesses in the federal courts depends on the Act of Congress in that behalf, passed in 1864, amended in 1865, and codified in the Revised Statutes, Sec. 858. It is not derived from the statutes of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only conditions and qualifications which Congress deemed necessary are expressed in the Act of Congress; and the admission in evidence of previous communications to counsel is not one of them."

Conn. Mut. Life Ins. Co. v. *Schaeffer*, 94 U. S., 457.

The Main Issue of Law.

Before discussing the main questions of law we desire to call the attention of the court to the following facts, which will not be disputed:

(1.) As to the main and branch lines of the First Division Company, complainant was not a trustee in any of the mortgages, nor was he ever appointed receiver of any of the mortgaged property. Prior to 1876 he had no official connection with those lines. From March, 1876, down to the foreclosure sales and the turning of the lines over to the purchasers, he was simply an employe of the trustees in possession, operating the lines as general manager under the direction of the trustees.

(2.) The five mortgages on the main and branch lines of the First Divison Company were foreclosed by suits in the state courts of Minnesota, and the sales were made by officers of

those courts. Complainant did not conduct those sales, had no power over or control of them, and if he had been himself a purchaser or the sole purchaser at these sales, could not in any sense be said to have been both buyer and seller, or to have bought the mortgaged property at his own sale.

(3.) As to the property of the St. Paul and Pacific Company, the bill on which complainant was appointed receiver was not filed for the purpose of foreclosing any mortgage. It contained no specific averment of default in the payment of principal or interest of the bonds secured. The grounds of relief stated were the failure of the First Division Company to comply with its construction contract; the misappropriation of the proceeds of $15,000,000 of bonds to other purposes than the completion of the extension lines; the collusion of the officers and directors with the Northern Pacific Railroad Company to obstruct and delay the building of the extension lines within the time required by law, with a view to the forfeiture of the land grant and its acquisition by the Northern Pacific Company; and the prayer is that the court shall appoint a receiver, and give him power to issue debentures and procure funds to construct the railroad and secure the land grant; that the lands and other property, or so much as necessary, be sold to pay the cost of completing the construction, "*and that after said extension shall be completed and the title to said lands secured*," the said extension mortgage may be foreclosed, etc. (Rec. 859, 467.)

(4.) The foreclosure decree under which the Extension lines and property of the St. Paul and Pacific Company (the Receivership properties) were sold, was not entered in the suit in which complainant was appointed receiver. The foreclosure decree was entered April 11, 1879, in the suit of *Jacob S. Wetmore et al.* v. *The St Paul and Pacific Railroad Company et al.*, in the Circuit court, and complainant was not a party to that suit, so far as this record shows. (Rec. 438.) Under

that decree the mortgaged property was sold by H. E. Mann, master in chancery of the court. (Rec. 449.) Complainant had no power or control over that sale in any manner whatever. Even if he had appeared and bid in the property at the sale, which by the terms of the foreclosure decree any bondholder or the trustees were authorized to do, it could not be claimed that complainant had purchased at his own sale.

1.

In our former briefs in the Supreme court in this cause, we cited a large number of authorities to show that in the absence of actual fraud, a purchase of the trust property by a trustee, or any one standing in fiduciary relation, is voidable only, and not void; and voidoble only at the election of the beneficiaries of the trust and not by third parties; and that this rule applies equally to purchases by trustees generally, by executors and administrators, by directors of corporations and joint stock companies, by guardians, attorneys, sheriffs, commissioners in chancery with power to sell, assignees in bankruptcy and their solicitors, and receivers appointed by the court. And our contention was, and is, that the case at bar, no actual fraud or moral turpitude being either alleged or proved, falls strictly within the rules laid down in this line of cases, decided by the highest state courts, the Supreme court of the United States, and the courts of last resort in England.

The rule that such purchases are voidable only, and not void, and will be set aside only at the instance of the *cestuis que trust*, has been applied to purchases by trustees, generally *Davoue* v. *Fanning*, 2 Johns. Ch., 252; *Wilson* v. *Troup*, 2 Cowen, 238, and numerous cases cited. Purchases by executors and administrators: *Harrington* v. *Brown*, 5 Pick., 519; *Ives* v. *Ashley*, 97 Mass., 198; *Jackson* v. *Walsh*, 14

Johns. R., 414; *Richardson* v. *Jones*, 3 Gill. & J., 184; *William's Executors* v. *Marshall*, 4 Gill. & Johns., 379; *Mitchell* v. *Dunlap*, 10 Ohio, 118; *Beeson* v. *Beeson*, 9 Barr., 280; *Thorp* v. *McCullom*, 1 Gilm., 615; *Williams* v. *Rhodes*, 81 Ill., 571; *Baldwin* v. *Allison*, 4 Minn., 25. Purchases by directors: *Ashurst's Appeal*, 60 Pa. St., 314; *Buell* v. *Buckingham*, 16 Ia., 284. Purchase by guardian; *Gallatin* v. *Cunningham*, 8 Cowen, 384. Purchase by attorney: *Hawley* v. *Cramer*, 4 Cowen, 717. Purchase by sheriff: *Lessee of Lazarus* v. *Bryson*, 3 Binney, 54. Purchase by commissioner in chancery. *McConnell* v. *Gibson*, 12 Ill., 128. Purchase by assignee: *ex parte Wiggins*, 1 Hill Ch., 353. Purchase by receiver: *Jewett* v. *Miller*, 10 N. Y., 402. Purchase by collecter of taxes at his own sale: *Pierce* v. *Benjamin*, 14 Pick., 356.

The same rule is well settled in the Supreme court of the United States.

Richard v. *Holmes*, 18 How., 143.
Badger v. *Badger*, 2 Wall., 87.
Marsh v. *Whitmore*, 21 Wall., 178.
Twin Lick Oil Co. v. *Marbury*, 91 U. S. R., 587.
Thomas v. *Brownville, &c., R. R. Co.*, 109 U. S. R., 525.

In *Thomas* v. *Brownville, &c., R. R. Co., supra*, on a bill to foreclose a railroad mortgage, made to secure bonds issued to a construction company, there had been a foreclosure decree and sale. The stockholders intervened, praying to set aside the sale and the mortgage, on the ground of fraud. The fraud set up in their answer and cross-bill, and proven was (1) that two of the directors of the company were interested in the construction contract; (2) that the parties securing the construction contract assumed the liability of all of the directors on their unpaid stock subscriptions, and re-

lieved them therefrom. The Circuit court held the construction contract, as well as the bonds, absolutely *void*, and dismissed the bill. The Supreme court reversed the decree on the following ground, as stated in the opinion:

"But as this court said in the case of the *Twin Lick Co.* v. *Marbury*, 91 U. S. R., 587, such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity."

2.

Some of the decisions go much further, and hold that a purchase by a trustee, at a sale he does not control, is not even voidable.

In the case of *Fisk* v. *Sarber*, 6 Watts & Sergeant, 18, the court held that the assignee of an insolvent debtor is not incapable, by reason of his fiduciary character, of becoming the purchaser of the debtor's real estate, when sold by the sheriff, upon a mortgage which incumbered it before the time of the assignment. This was put upon the ground that the trustee was not in this case both buyer and seller at the same time; that the sale was at public auction, by an officer of the law, and was in no respect under the control of the trustee. The property having been "taken out of his possession, as it were, and certainly out of his power, by the authority of the law, which is paramount to any he has as trustee, and placed in the hands of the officer of the law, to whom full power is given to sell and dispose of the same, it is perfectly manifest that he thereby becomes divested of his trusteeship in regard to it; that all his power and control over it cease, so that he has no duty what-

ever to perform in respect to it in the slightest degree incompatible with his buying at the lowest price for which it may be obtained; and as to the sale to be made by the sheriff, it is impossible to conceive how the trustee can exercise any control or influence over it, to the prejudice of those whose interest it is to have the property sold for the highest possible price, that any other individual, disposed to buy, may not exert."

Notwithstanding the very able dissenting opinion by Rogers, J., the rule laid down by the majority of the court was affirmed and followed in the case of *Cadbury* v. *Duval*, 10 Barr., 265; and in Chorpenning's Appeal, 32 Pa. State, 315, where it was held that the doctrine that a party will not be allowed to purchase and hold property for his own use and benefit, when he stands in a fiduciary relation to it, does not apply when the sale is made by a public officer, under proceedings adverse to the interest of the *cestui que trust*, and the trustee has not the means in his power to prevent the sale.

Fish v. *Sarber*, 6 Watts and Sergeant, 18.
Cadbury v. *Duval*, 10 Barr, 265.
Chorpenning's Appeal, 32 Pa. St., 315.

In a late case in Pennsylvania, the Supreme court said: "It has been the conceded law of this state, since the case of *Fisk* v. *Sarber*, 6 W. & S., 18, that at a judicial sale, not controlled by the trustee, the trustee can be a purchaser," and that such a sale is not even voidable.

Lusk's Appeal, 108 Pa. St., 159.

In North Carolina, the cases of *Doe* v. *Hassell*, 68 N. C. 213, affirmed and followed in *Lee* v. *Howell*, 69 N. C., 200, establish the same rule. In the former case the court say: "What objection can there be to a guardian bidding at a sale made by a commissioner under a decree of the court? * * * This is quite different from the case of a guardian purchasing at his

own sale, where he is both the seller and purchaser, as in the cases cited by plaintiff's counsel."

Doe v. *Hassell*, 68 N. C., 213.
Lee v. *Howell*, 69 N. C., 200.
Sheldon v. *Estate of Rice*, 30 Mich., 296.

3.

The distinction sought to be made by counsel for defendants, between purchases by receivers, and those by other persons standing in fiduciary relations; and the claim that the former are absolutely void, while the latter are voidable only, rests upon no sound foundation, either of principle or authority. No adjudicated case was cited, nor do we believe an authority can be found to support such a distinction.

In the notes of Hare & Wallace to *Fox* v. *Mackreth*, 1 Lead. Cas. in Eq. (3 Am. Ed., p. 209), after stating in the broadest terms the rule rendering purchases by trustees voidable only, the learned authors say:

"And this principle applies to executors, administrators, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs and all persons judicial or private, ministerial or counseling, who, in any respect, have a concern in the sale of property for others."

The same broad rule is laid down in *Thorp* v. *McCullom*, 1 Gilm., 615, and applied to trustees, assignees, commissioners and solicitors of bankrupts, executors, administrators, guardians, agents and officers of the court.

See also

Jewett v. *Miller*, 10 N. Y. R., 402.
Carr v. *Houser*, 46 Ga., 477.
Alvan v. *Bond*, 3 Ir. Eq., 365.

In *Jewett* v. *Miller*, *supra*, a purchase by a receiver at a master's sale of a part of the trust property, was held voidable only by the *cestuis que trust*.

In *McConnell* v. *Gibson*, 12 Ill., 128, the same was held of a purchase through an agent by a commissioner in chancery at his own sale of the real estate he had been appointed by the court to sell.

In the case of *Pierce* v. *Benjamin*, 14 Pick., 356, the collector of taxes had sold certain property at public sale for non-payment of taxes. He was the highest and best bidder at his own auction, and struck off the property to himself. The court held this was clearly a violation of his official duty, and then said:

"But a sale *by an officer*, or other trustee, to himself, is not absolutely void. The *cestui que trust* has an option to affirm or avoid it, as he may judge most advantageous to himself; as the plaintiff has made no election to annul the sale, by a demand of the property, or otherwise, before the commencement of the action, it may well be doubted whether, upon this ground, he could recover."

In *Lessee of Lazarus* v. *Bryson*, 3 Binney, 54, where the sheriff, through an agent, had bought real estate at his own sale on execution, the court held the purchase voidable only; that there was no distinction in law between that case and the case of a trustee who purchases at his own sale.

In the notes of Hare & Wallace to *Fox* v. *Mackreth*, 1 Lead. Cas., in Eq. (3d Am. Ed.). the rule is thus stated:

"A purchase by a trustee is not absolutely void; it is voidable only by the *cestuis que trust*, in equity, and then only upon certain terms; it is valid in equity as well as at law unless some of them choose to avoid it." (Page 217 and cases cited.)

"No person but the *cestuis que trust*, that is, the persons interested in the property or in the sale of it, can apply to be relieved against the purchase by the trustee, and a stranger cannot avoid the sale." (Page 218 and cases cited.)

4.

The fact that the trustee, or person claiming through him, was the plaintiff at law, or complainant in equity seeking relief, has been held not to affect the application of the rule.

The following are cases at law:

Harrington v. *Brown*, 5 Pick., 519.
Knox v. *Jenks*, 7 Mass., 492.
Jackson v. *Walsh*, 14 Johns. R., 408.
Murphy v. *Teter*, 56 Ind., 545.

The following are cases in equity:

Beeson v. *Beeson*, 9 Barr, 280 and cases cited.
Mulford v. *Minch*, 3 Stockton, 16.
Thorp v. *McCullom*, 1 Glim., 614.
Rice v. *Cleghorn*, 21 Ind., 80.
Dunlap v. *Mitchell*, 10 Ohio, 117.
Baldwin v. *Allison*, 4 Minn., 25.
Kent v. *Chalfant*, 7 Minn., 487.
Ex Parte Wiggins, 1 Hill Chy. (S. C.), 353.
Buell v. *Buckingham*, 16 Ia., 284.
Harvey v. *Varney*, 98 Mass., 118.

The foregoing cases are full to the point that where the *cestuis que trust*, or persons entitled to complain, are not before the court complaining, the contract or purchase, as the case may be, will be enforced and relief given thereon, as between the parties to the transaction who do not stand in the relation of trustee and *cestuis que trust*.

5.

The agreement and undertaking which are alleged to have been against public policy, having been completely carried out and executed, defendants will not be permitted to defraud complainant of the profits in their hands by raising this objection.

McBlair v. *Gibbs*, 17 How., 232 and cases cited.
Brooks v. *Martin*, 2 Wallace, 70 and cases cited.
Planters Bank v. *Union Bank*, 16 Wall., 499.

Miltenberger v. *Cooke*, 18 Wall., 421.
Fackler v. *Ford*, 24 How., 323.
Harris v. *Runnels*, 18 How., 79.
Railroad Co. v. *Durant*, 95 U. S., 576.
Harvey v. *Varney*, 98 Mass., 118.

The distinction between positive fraud which renders the contract or purchase absolutely void, and the effect attributed by public policy to legal or constructive fraud, which renders the purchase by a trustee of the trust property voidable only, is universally recognized. In the latter class of cases, the court of chancery does not denounce the transaction as morally wrong, or as in any way involving moral turpitude, but will sustain the purchase under the limitations and conditions hereinbefore mentioned.

Beeson v. *Beeson*, 9 Barr., 280, and cases cited.

6.

In the first twelve pages of his brief on the law of the case, filed in the court below, counsel for defendants endeavored to show: (1.) That even if a valid agreement was made, complainant has no cause of action against the defendants. (2.) That if he has any cause of action, it is at law and not in equity.

We submit, a better mode of stating the question would be: (1.) Do the facts alleged in the bill constitute a valid cause of action in equity? (2.) Are the material allegations of the bill sustained by the evidence?

The first question is no longer open. After the bill was filed a demurrer was interposed. This was overruled by the court, and the sufficiency of the bill was thereby adjudicated. Defendants then filed a plea, which necessarily admitted the case stated in the bill. This plea, on appeal to the Supreme court, was overruled as false, and defendants were required to answer

the bill. They have answered on the merits, and it is now too late for them to claim that the cause of action is at law, and not in equity.

As to the second question, we have hereinbefore, and in our original brief, endeavored to show that the material allegations of the bill are supported by the proofs.

We shall, therefore, address ourselves to the questions of law properly arising on the facts proven.

I.

THE QUESTION OF ACTUAL FRAUD.

The main controversy in law between the complainant and the defendants may be briefly stated as follows:

Our position is that the transaction by which the mortgage bonds were purchased and used in the acquisition of the property at the foreclosure sales, was a fair, open and legitimate transaction, known to and sanctioned by the court, in which the decrees were entered, approved and recommended by the trustees, representatives and committee of the bondholders; and that the agreement was carried out in good faith and with perfect fairness to all persons interested in the property. And further, that under all the circumstances, particularly the condition of the property, and the inability or unwillingness of the bondholders to raise the money required to construct the unfinished sections of the railroad lines, which was absolutely necessary to prevent the forfeiture of the land grants, and to preserve the security of the bondholders, the sale of the bonds at the time and in the manner in which it was made and carried out, was the best disposition the bondholders could have made of them.

This being the nature of the transaction out of which this suit arises, our position further is, as matter of law, that appel-

ant's interest in the purchase is not, as claimed by appellees, *ipso facto* absolutely void by reason of the fiduciary relations of appellant as receiver of one of the railroad lines, and general manager of the other; but that, on the contrary, in the absence of actual fraud, his interest in the purchase is valid and enforceable at law and in equity as against all persons not standing in the relation of *cestuis que trustent*, and that the appellees, not being *cestuis que trustent*, have no right or standing to raise the objection. We base this position on an unbroken line of authorities, many of which are cited *supra*, and to which further reference will hereinafter be made.

On the other hand appellees contend that by reason of the fiduciary relations of appellant, as receiver and general manager, his interest in the purchase or his agreement to be interested in the purchase, is *ipso facto* and without proof of actual fraud, absolutely void.

In support of this position, which is claimed to be founded on some rule of public policy, appellees' counsel has not cited, and can not cite a single direct authority.

We say this is appellees' contention, because it is the only issue in that behalf raised by their answer, in which, after reciting appellant's appointment to and acceptance of the positions of receiver and general manager, they set up as follows:

"And these defendants say that as receiver of said lines and other property covered by said $15,000,000 mortgage, the plaintiff could not lawfully make the pretended agreement with Kittson and Hill, alleged in said bill, for the purchase of the mortgage bonds secured on said property, and the purchase of said mortgaged property of which he was at the alleged time of making such pretended agreement the receiver as aforesaid, nor was it lawful for him to engage in the pretended enterprise for purchasing such bonds and property, which is alleged in said bill.

"And they say that said pretended agreement, if ever made (which these desendants do in no wise admit) was against public policy, and was in its inception, and has always been wholly void; and that the making of such an agreement, and the embarking in such an enterprise as that alleged in said bill was a breach of trust on plaintiff's part as such receiver, and a violation of the duties owing by him as such receiver to all persons interested in said property, and to this court, whose receiver he was.

"And these defendants say that as general manager for the trustees in said mortgages of the lines of railroad of said First Division of the St. Paul and Pacific Railroad Company, the said plaintiff held a position of trust and confidence toward his employers, the said trustees in possession of said lines, and toward the stockholders in said company, and the holders of the bonds secured by said mortgages, and could not lawfully make the said pretended agreement with said Kittson and Hill, or engage in said pretended enterprise for purchasing said bonds and mortgaged property, which are alleged in said bill; but said agreement, if ever made, was in its inception and has always been against public policy and utterly void.

"And these defendants say that by reason of the said illegality of said pretended agreement and said pretended enterprise, the plaintiff is not entitled to maintain this or any other suit or action founded upon and brought to enforce the said pretended agreement, or any rights claimed to have arisen therefrom." (Rec., 28, 29.)

These are the only averments in the answer in regard to the matters now under discussion. No facts are set up which would constitute what the law denominates *actual fraud*. The only *facts* alleged in that behalf are that complainant was receiver of one of the railroad lines and general manager for the trustees in possession of the other. The remainder of the

averments simply raise the question of constructive fraud, as implied in law from a purchase, by one standing in fiduciary relations, of the property which is the subject of the trust.

Mr. Justice GRAY, in delivering the opinion of this court upon the plea contained in the former record, the averments in which were almost identical with those in the present answer, said:

"The averments in the third part of the plea, that, by reason of the plaintiff's position as receiver and general manager of the railroads, his entering into the agreement sued on, and engaging in the enterprise of purchasing the bonds, and thereby acquiring the railroads, were unlawful, and did not entitle him to the aid of a court of equity to enforce the agreement or any rights growing out of it, *were averments of pure matter of law*, arising upon the plaintiff's case as stated in the bill, and affecting the equity of the bill, and therefore a proper subject of demurrer, and not to be availed of by plea."

Farley v. *Kittson*, 120 U. S., 318.

We might here rest the discussion as to whether the question of actual fraud is presented on this record; for it is a fundamental rule, both of law and equity, that a defendant can rely upon no defense which he does not raise by allegation as well as sustain by proof.

In *Van Weel* v. *Winston*, this court held that a general charge of fraud will not be regarded; and that the facts constituting the alleged fraud must be distinctly stated and clearly proved.

Mr. Justice MILLER, delivering the opinion of the court in that case, said:

"The bill is a long one, the allegations are not classified, nor the true foundations of relief very clearly stated. It is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words, in and

of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in there essential nature constitute a fraud or breach of trust, for which a court of chancery can give relief. *Ambler* v. *Chouteau*, 107 U. S., 586, 590."

Van Weel v. *Winston*, 115 U. S., 228.

The same rule is laid down, even more explicitly, in several of the earlier decisions of the court.

"Fraud consists of intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable."

Moss v. *Riddle*, 5 Cranch., 351.

"In equity as at law, fraud and injury must concur, to furnish grounds for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance."

Clarke v. *White*, 12 Peters, 196.

To constitute actual fraud, there must be not only contrivance, design or intention to injure another, but actual damage or injury resulting to some one is a necessary element, which must be alleged and proved. Actual fraud will never be presumed.

Conard v. *Nicoll*, 4 Peters, 297.
United States v. *Arredondo*, 6 Peters, 716.

Where the allegation is of actual fraud, relief cannot be given on the ground of constructive fraud, and *vice versa*. The complainant can only recover *secundum allegata et probata*.

"Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established

doctrine of a court of equity, that when a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of *Price* v. *Berrington*, decided by Lord Chancellor Truro, in 1851, *vide* English Law Equity Rep., Vol. 7, p. 254."

Eyre v. *Potter*, 15 How. 42.

Appellees have not only failed to plead actual fraud; the record contains no proof to support such an allegation even if it had been pleaded.

The only persons interested in the property at the time this agreement to purchase the bonds was entered into, or at the time it was carried out, and the only persons, therefore, who could have been thereby defrauded, were: (1.) creditors; (2.) stockholders; (3.) bondholders.

1. There is no evidence in the record of any unpaid creditors. The rights of employes and all other creditors were carefully protected in the order authorizing the construction of the Extension lines (Rec., 1559), in the foreclosure decrees (Rec., 437), and in the order directing the property to be turned over to the purchasers at the foreclosure sales. (Rec., 449.) No creditor, so far as appears in the record, has ever complained of any fraud practiced upon him in the transaction.

2. There is no evidence of any fraud practiced upon stockholders.

The stock of the Extension lines, of which complainant was receiver, was held and owned by the Northern Pacific Railroad Company, and appears to have been acquired by that company fraudulently, and without consideration.

The sworn bill of complaint in the Kennedy suit, filed July 14, 1873, which was introduced in evidence herein by the defendants, (836–61), alleges:

"That the shares of said First Division Company, and of the St. Paul Company, to the full amount of the capital thereof, were falsely and fraudulently issued as full paid stock, without any payment therefor to the company, and were so issued to some person or persons unknown to the plaintiffs, by which person or persons the same were transferred to said Northern Pacific Railroad Company, which received and held the same with notice of said fraudulent issue, and paid such person or persons therefor a sum far less than the nominal amount thereof."

"That said St. Paul Company and said First Division Company are wholly without the means or credit to procure the completion of their lines of railroad, and the whole property of said companies will not suffice to pay their debts, and the shares of the capital stock of said two companies are therefore of no actual value as property, and the whole of the estates and franchises of said two companies, constitute, in effect, a trust fund for the benefit of the bondholders alone, and in equity ought to be managed and administered for the exclusive benefit and protection of the bondholders." (Rec., 857.)

This bill was sworn to by John S. Barnes, agent and trustee of the bondholders (Rec., 861), and the facts above stated as to the ownership of the stock by the Northern Pacific Company are sworn to in the affidavits made July 9, 1873, by L. J. H. Wilmar (Rec., 871), and William Crooks (Rec., 880), filed in support of the bill. These affidavits were also introduced in evidence by defendants. (871, 877.)

The stock of the Extension lines was transferred and surrendered to the syndicate by the Northern Pacific Company, in the general settlement negotiated with that company in the fall or latter part of 1878. (Rec., 642.) The Northern Pacific

Company, as stockholder, has never complained of the transaction, and no wrong or fraud appears to have been practiced upon it in the matter.

The stock of the First Division Company, of which complainant was general manager at the time of its purchase, which was before the entry of the foreclosure decrees, was held and owned by E. C. Litchfield and persons represented by him.

The negotiations for the purchase of this stock were conducted by George Stephen. It does not appear that appellant took any part in these negotiations, other than to advise and urge that the stock be purchased, and to inform Kittson and Hill of the price they could afford to pay.

3. There is neither averment nor proof in the record of actual fraud practiced upon bondholders in the purchase of the bonds, or in their use in payment for the property at the foreclosure sales.

We have in this brief heretofore pointed out the proofs which demonstrate the fairness and good faith of the transactions between the purchasers and the bondholders. It is unnecessary to repeat them here. It is sufficient to say that these proofs, consisting not only of oral testimony, but of documentary and record evidence are satisfactory and convincing.

The appellees, notwithstanding their numerous insinuations, have not ventured to plead, nor seriously undertaken to prove, the commission of actual fraud in these transactions.

In the case at bar, defendants have two totally inconsistent defenses, of each of which they naturally desire to avail themselves to the fullest extent. These two defenses are inconsistent to such a degree, that if either one is true the other is absolutely false.

The first defense is, that Mr. Farley never had any bargain or agreement whatever with Kittson and Hill, looking

to the purchase of the bonds; that he was in no wise interested in the purchase, and never did anything in aid or furtherance of the project, except what he might lawfully do in the proper discharge of his duties as receiver and general manager. If this be true, neither actual nor constructive fraud of any kind can be imputed to him.

The second defense is that Mr. Farley did have a bargain and agreement with Kittson and Hill, was interested in the purchase, concealed that interest from the court, the stockholders and the bondholders, and in consequence thereof was guilty of a violation of duty and breach of trust toward these several parties.

As we have repeatedly stated, there is no allegation in the pleadings and no proof in the record of any actual fraud perpetrated upon the bondholders whose bonds were purchased by the syndicate and used in payment for the property at the foreclosure sales, and even as to the outstanding bondholders there is no evidence that their bonds were purchased at less than their true value.

On the other hand, the question whether any actual fraud was practiced on the minority bondholders, in the transactions under consideration, has been repeatedly passed upon and decided in the negative by the court below in suits brought directly by minority bondholders against the purchasers.

In *Sahlgaard* v. *Kennedy et al.*, *Stricker* v. *Same*, and *Messchaert* v. *Same* (13 Fed. Rep., 242), bills were filed by certain minority bondholders to set aside the decrees, sales and confirmations in the foreclosure of the $3,000,000, $6,000,000, and $2,800,000 mortgages on the main and branch lines of the First Division Company, on the ground of fraud.

Mr. Farley was not a party to any of these suits; his interest in the purchase was not charged in the bills, that question

was in no wise involved in or determined by these suits, and his name is not mentioned in the decision.

"The defendants answered the bills in each suit, and a large amount of testimony was taken. The three suits were argued together at the June term, 1882, of the United States Circuit court at St. Paul, before Treat and Nelson, JJ. The court dismissed the bills in each case, holding (1.) That Sahlgaard's suit was wrongfully brought. (2.) That the Stricker and Messchaerts suits were speculative, and tainted with champerty. (3.) That there was no fraud in any of the proceedings of Mr. Kennedy, or the other trustees, nor in any of the acts by which Messrs. Stephen, Smith, Kittson and Hill acquired their bonds and the mortgaged property. (4.) That the proceedings in the foreclosure suits, including the decrees, sales, and confirmations, were valid, and the bondholders have no claims on any of the property."

"Similar unsuccessful attempts by Sahlgaard and his associates to set aside the decree and sale of other portions of the line of the Manitoba Company (viz.: the Extension Line of the St. Paul and Pacific Railroad company, sold under foreclosure of a $15,000,000 mortgage, on June 14, 1879) were made and defeated in the cases of *Kropholler* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 1 McCrary, 299; S. C., 2 Fed. Rep. 302, (opinion by Nelson, J.); *Wetmore* v. *St. Paul & Pacific R. Co.*, 5 Dill., 531; S. C., 1 McCrary, 466, 3 Fed. Rep., 177, (opinion by Mr. Justice Miller); and in the case of *Wilton* v. *St. Paul, Minneapolis & Manitoba Ry. Co.* (opinion by Nelson, J.), not reported."

TREAT, D. J., in the opinion of the court, said, (p. 248):

"There is a common ground of complaint in all of these cases, on which, independent of technical considerations, they would necessarily rest. It is charged that the decrees and decretal orders in the State court were fraudulent. This court

has read with scrupulous care all the evidence before it, in the light of the undisputed rule that fraud must be proved and can not be presumed,—that is, actual fraud. There were many suspicious circumstances which called for explanation, and which, as Justice Miller says, are not to be viewed in the light of after events for a correct interpretation. All the facts and circumstances must be considered as they existed with respect to the property involved at the time action was had with regard thereto. It is not uncommon that men embark in enterprises which promise great gain, and are ruined thereby; and, on the other hand, men invest in doubtful enterprises and win eminent success. The latter seems to have been the case in hand. The foreclosure suits had been long pending. All parties concerned knew that without relief from some unknown quarter, decrees and sales would inevitably follow. The bondholders, represented by their trustees, were urging such decrees and sales. In the meantime, the depreciated bonds were on the mariket, subject to the outcome of pending litigation. The majority resolved on the course deemed best for the interests of all, and urged all to join them. The known end was reached, ample opportunity for rescue having been given to the minority bondholders to appear, if they chose to incur the needed responsibility for averting the catastrophe. They did not choose to move in the matter, although invited so to do. Where, then, is the actual fraud? None appears. Mere inadequacy of consideration at a judicial sale does not establish a fraud.

"But it is further urged that a constructive fraud exists, and on the solution of that question, if none other applies, these suits must hinge. Every authority cited, and many others have been carefully examined in order to reach a right conclusion. Most of the cases have turned upon the action of a trustee in buying for himself the property of his beneficiary, or speculating upon his trust in some way, for his owns benefit, to the

detriment of those whose interests were intrusted to him for their protection. He can not be agent of both buyer and seller and favor one to the injury of the other, his double relationship being concealed. It is not necessary to refer to cases of attorney and client, guardian and ward, etc. Kennedy & Co. were the representatives of the Amsterdam committee in an agreement pronounced by Justice Miller to be perfectly legitimate. As such representatives, they were bound to see that the syndicate complied with the contract made. They held the securities in their hands for the enforcement of the contract. That could not be effected until after decretal sales and confirmations. Those decretal sales were to be for the benefit of all bondholders, and every bondholder and stranger was invited to purchase. Full publicity was given. When Mr. Kennedy became a trustee by appointment, what was his duty to the bondholders? Evidently, to enforce their rights through foreclosure. All other means had failed. His duties as representative of the Amsterdam committee, instead of being repugnant to his duties as trustee, were in entire accord. If, however, he, in actual fraud of the rights of the minority bondholders, entered into a scheme with the so-called syndicate to sacrifice the property, so that the syndicate should acquire the same in a way to defraud the minority, then not a constructive, but an actual, fraud existed. As already stated, no actual fraud is shown, and no constructive fraud appears."

In *Wetmore* v. *St. Paul and Pacific R. Co.*, 5 Dillon, 535, *supra*, Mr. Justice Miller said:

"The great objection, however, is that these bondholders (the so-called syndicate) commenced proceedings long ago, under the foreclosure proceedings, to organize themselves into a body of men by a committee for the purpose of buying the road. In regard to that, it is to be said that they excluded nobody—none of the bondholders—from coming in on the same terms as themselves. They invited every one to

come in with them. These petitioners, representing a million and a half, who now hold these bonds, stood out and declined to come into that arrangement, and took no steps to protect themselves or the property. What right have they, when these parties spent money, time and trouble to have this road sold, to claim all the advantages which diligence and labor and money expended (and especially the money of these debentures)—what right have they to come in now and say, "we avail ourselves of your labor, money and time, for the simple reason that you undertook to get this road sold for the purpose of paying yourselves as well as us?"

"Because these men co-operated and put themselves into condition to buy the road, it does not seem to me that they were, therefore, acting in any fraudulent manner. They deprived these petitioners of none of their rights. They were at liberty to join the syndicate, as it was called; they were at liberty to bid; they were at liberty to come in and make themselves parties. They did nothing of the kind. Were these bondholders who purchased the road to be put into the condition of a single man who owned twelve millions out of fifteen millions of bonds, I can see no reason why they should not take steps to have the road sold, and buy the road as cheap as they could get it, provided they cheated or hindered nobody in the matter."

It is further urged by counsel for appellees that Farley, Kittson and Hill having entered into the agreement to purchase the bonds and, through their use, the mortgaged property; and complainant, Farley, being at the time of entering into the agreement the receiver of one of the mortgaged lines, and his interest in the purchase not having been disclosed to, or having been concealed from the court, that this constituted, as appellees say in the answer filed, such a violation of his duty to the court, or, as counsel says in argument, such a

fraud upon the court, as to render the agreement absolutely void.

Our answer to this contention is that there could have been no fraud upon the court, unless a fraud—some actual damage alleged and proven—was in some way practiced upon some person, or class of persons, whose interests were under the protection of the court. We submit that in this record there is neither allegation or proof of any fraud perpetrated upon creditors, stockholders or bondholders, who were the only persons interested in the property before the sale.

In regard to the mere matter of concealment of appellants' interest in the purchase, we do not believe a case can be found in which it has been held that the non-disclosure of the interest of the trustee in the contract or purchase rendered a transaction utterly void, which would otherwise have been held voidable only.

In the cases of *Ashuelot R. Co.* v. *Elliott*, 57 N. H., 397; *Alven* v. *Bond*, Flan. & Kelly, 196, and *Eyre* v. *McDonnell*, 15 Ir. Chy., 534, cited by counsel for defendants, the court found there was such concealment, and yet, in neither of those cases, as we shall hereafter attempt to show, was it held that this circumstance took the case out of the general rule as to purchases by trustees, which are voidable only.

And, indeed, in nearly every case of a purchase by one standing in fiduciary relations, made through the agency of a third person, there must necessarily be concealment or non-disclosure of the interest of the trustee; the mode of purchase *per interpositam personam*, is adopted with a view, in part, to that very end, and yet, as we shall attempt to show, a purchase by a trustee *per interpositam personam*, in the absence of fraud in fact, is not, on that account, held void, but is voidable only by the beneficiaries of the trust.

We are aware that an inference of actual fraud in such a

purchase is sought to be drawn from the case of *Michoud* v. *Girod*, 4 How., 553, but we are confident we can show that such an inference is entirely unwarranted by anything in that decision.

II.

MICHOUD V. GIROD, AND OTHER DECISIONS OF THE SUPREME COURT.

The case of *Michoud* v. *Girod*, 4 How., 553, is relied upon as holding that purchases by trustees of the property which is the subject of the trust, either directly, or through an agent, are absolutely void: and counsel seems to think the doctrine of that case is a departure from the general and universally recognized rule that such purchases are voidable only.

Notwithstanding some of the language used by the learned justice who delivered the opinion, the case will bear no such construction.

In *Michoud* v. *Girod*, the court held, that if a trustee, or any person acting for others, sells the trust estate, and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside. That was a bill filed by certain heirs of a deceased testator against one of his executors, to set aside a purchase by the executors, through an agent employed by them, of the property of the testator, in fraud of complainant's rights. The rule was extended to trustees, agents, attorneys, arbitrators, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, guardians, administrators, and all other persons, who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property. All these are held incapable of purchasing the trust property, except under certain

restraints, *i. e.*, that the sales will be set aside on the application of the *cestui que trust*. But nothing in that decision intimates that such a purchase will be set aside or held void at the instance of a stranger, or any other person than the *cestui que trust*. The case is not in conflict with the general current of authority holding such purchases voidable only.

That we are correct in our statement of the real meaning of the opinion in *Michoud* v. *Girod*, is not only apparent from a careful study of the case itself, but this view is sustained by the construction put upon that decision by other courts, and by the subsequent decision of this court on the same subject, which are totally inconsistent with the inferences sought to be drawn from the language of the decision in *Michoud* v. *Girod*.

Boyd v. *Blankman*, 29 Cal., 19.
Beeson v. *Beeson*, 9 Barr., 299.
White v. *Iselin*, 26 Minn., 487.
Richard v. *Holmes*, 18 How., 143.
Badger v. *Badger*, 2 Wall., 87.
Marsh v. *Whitmore*, 21 Wall., 178.
Twin Lick Oil Co. v. *Marbury*, 91 U. S., 587.
Thomas v. *Brownville, etc., R. Co.*, 109 U. S., 525.

In *Boyd* v. *Blankman*, 27 Cal., 19, a purchase, through another person, of land of his intestate by an administrator at his own sale, was held to be not void, but only voidable at the election of the heirs or other persons interested in the estate, who might have the sale set aside, and the administrator declared a trustee.

RHODES, J., delivering the opinion of the court, said:

"*Is the purchase by an administrator of the land of the estate at his own sale, void, or is it merely voidable?* Is the sale void, or is it merely voidable? The doctrine that a purchase

of the trust property by a trustee for sale, made at his own sale, whether the purchase is affected by himself or through the interposition of another person, is voidable at the election of the *cestui que trust*, is as firmly established, and is supported by as clear and satisfactory reasons as any rule in equity. Both parties hold that it was only voidable, and yet the question is involved in much perplexity, and when tested by the rules applicable to such cases, some doubt still remains. An administrator is the creature of the statute. He has no existence independent of the statute, and in taking upon himself the duties and trusts created by it, he assumes them with all the clogs and restrictions the statute has attached to the office. These restrictions may be other or greater than those controlling persons acting under private appointment, in a capacity vary analogous to that of an administrator, but the person accepting the trust takes it not only with the powers, but with disabilities incident to the position. Among the restrictions is that contained in section 193 of the Probate Act, that "No executor or administrator shall, directly or indirectly, purchase any property of the estate which he represents." This provision cannot be said to be in affirmance of the common law, for at law it was held that the legal title did pass by the purchase of the trustee, effected through the agency of a third person at the trustee's sale of the property, and it was only in a court of equity that the sale was held not to pass the title: *Jackson* v. *VanDalfsen*, 5 Johns., 43; *Davoue* v. *Fanning*, 2 Johns. Ch., 252. Regarding the section as creating a personal disability to take property—as depriving him of the power and capacity to receive and hold the title for any purpose—it would seem impossible to escape the conclusion that the sale would be absolutely void. A conveyance made by the administrator to himself is *ipso facto* void without regard to section 193, for it bears its own invalidity upon its face. But the conveyance to a third person after a sale to him, and a confirm-

ation of the sale, although secretly made for the use of the administrator, gives such person a *prima facie* title to the land, and the invalidity of the title is made to appear upon the fact being ascertained and determined in the proper court that the purchase was made by the administrator *per interpositam personam*. Before that fact is determined there would seem to be but little if any doubt that the third person, who had taken the title for the administrator, could pass it to a *bona fide* purchaser for a valuable consideration without notice of the fraudulent purchase. It is true that if the sale is held to be absolutely void, he could not pass the title to an innocent purchaser; but the rules of equity, which were devised to protect the *bona fide* purchaser as well as the *cestui que trust*, would forbid that result, if it could be avoided consistently with the statute. The grantee of the purchaser at the administrator's sale, after having made all the inquiries that could be required of a prudent man, might be at the mercy of a fraudulent conspiracy between the persons interested in the administrator's sale, resulting in the proof that the sale that had in truth been made to the purchaser named was in fact made to the administrator, through the intervention of the nominal purchaser. On the other hand, the *cestui que trust*, if the administrator in fact purchased at his own sale, has several remedies which may afford him adequate relief. He may have the sale set aside and the administrator declared a trustee; he may sue upon the administrator's bond, or he may proceed to recover the penalty of double the value of the land sold, according to section 189 of the Probate Act.

"A conveyance cannot be said to be utterly void unless it is of no effect whatever, and is incapable of confirmation or ratification. The acceptance of the purchase money, with full notice that the administrator was the purchaser, *per interpositam personam*, would unquestionably amount to a ratification of the sale. The court would not countenance a partial dis-

affirmance of the sale that would enable the *cestui que trust* to hold on to the purchase money, and at the same time recover the land. *Terrill* v. *Auchauer*, 14 Ohio St., 80.

"It is said by Mr. Chief Justice Spencer, in *Anderson* v. *Roberts*, 18 Johns., 528 (9 Am. Dec., 235): 'Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity; and therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one.' It is not declared by the statute that the purchase by the administrator is utterly void, but if it is held that the prohibition against his purchasing amounts to that, in effect, it does not necessarily follow that strangers can allege that the sale is void."

"The statutes of the 13th and 27th Elizabeth, and the statutes of the states having the same general purpose, declare that sales, etc., made to hinder, delay or defraud creditors, shall be absolutely void, and the cases both in England and the United States holding that those sales are void only at the instance of the parties injured are too familiar and numerous to require citation. In *Greene* v. *Kemp*, 15 Mass., 515 (7 Am. Dec., 169), the purchaser of the equity of redemption attempted to set up and rely upon the statute declaring that mortgages, etc., tainted with usury, were 'utterly void' for the purpose of defeating a recovery of the possession of the mortgaged premises by the mortgagee, who had foreclosed; but the court held that the mortgage was merely voidable, and that as the defendant was a stranger to the mortgage transaction, and possessed no title in the land, but only a right to redeem, he could not rely upon that defense, and that only the mortgagor and those who may lawfully hold the estate under him could set up the usury. See, also, *Jackson* v.

Henry, 10 Johns., 195 (6 Am. Dec., 328); *Dix* v. *Van Wyck*, 2 Hill, 522."

* * * * *

"The terms 'void' and 'voidable' are not always employed, either in the statutes or reports, with strict legal accuracy; but we find no case which, when critically examined in connection with the character of the action and the facts of the case, holds sales made in the face of a prohibition, such as is found in section 193, to be utterly void. Many cases are found in which the *cestui que trust* or his heirs have sued to set aside the sale, or to have the trust established and declared, and in those cases the courts have said that the sales were void, or were fraudulent and void; that is to say, that when the *cestui que trust*, or those claiming title under him, manifest their election to disaffirm the sale, and commence a suit to set it aside, the court pronounces the purchase by the trustee at his own sale void as against the *cestui que trust*, and sets it aside, and declares the trustee still a trustee, and orders a new sale or affords such other relief as the exigencies of the case demand. Such was the case of *Michoud* v. *Girod*, 4 How., 503. which was a suit in equity by certain heirs of a deceased testator, against the legal representatives of one of his executors, who was also one of the heirs, to obtain the complainant's just share of the estate of the testator. The two executors had purchased the property of the testator through an agent, and one of the executors purchased of his co-executor his half of the property; and the executor who held all the property having died, the suit was brought against his legal representatives. It will be seen that there were no "strangers" to the transaction among either of the parties. The complainants alleged that the sales were fraudulently made, and the defendants denied fraud in fact or intention, on the part of the executors, and alleged that the sales were judicially ordered and conducted, that the purchases were

rightfully made for a fair price, and at public auction. The court held that it would not in such a case enter into an investigation as to whether there was fraud in fact, or whether the sale was for a fair price, and made at public auction; but that upon its being made to appear that the trustee had purchased at his own sale, the court would set the sale aside as fraudulent and void as against the *cestui que trust* without further inquiry. The language employed by Mr. Justice Wayne, in delivering the opinion of the court, is comprehensive enough to express that the sale was absolutely void; but that point was not involved in the case, for if the sale was held to be fraudulent and void at the instance of the *cestui que trust*, that disposed of all the questions arising upon that branch of the case; and as we have remarked, there were no strangers to the transaction before the court; but as plaintiffs, only some of the heirs of the testator, and the representatives of other of the heirs; and as defendants, the representatives of one of the executors. That the court did not intend to go further than to hold the sale voidable, appears from the fact that the rule as to the disability to purchase, cited from Sir Edward Sugden, is, in the language of the court, "the rule as to persons incapable of purchasing particular property except under particular restraints, on account of the rules of equity," and according to those rules the sale was merely voidable; also from the fact that the cases cited by the court, among which *Davoue* v. *Fanning*, 2 Johns. Ch., 252, is relied on as a "critical and able review of the doctrine as applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our state chancery courts as altogether putting the rule upon its proper footing," hold that these sales are merely voidable; and from the further fact that the court proceeded to set aside the sale complained of, which was a useless proceeding if it was absolutely void."

In *Beeson* v. *Beeson*, 9 Barr, 279, which was a case of pur-

chase by an executor of the trust property, the court, after laying down the general rule as to purchases by trustees, executors, commissioners and assignees of bankrupts, solicitors, auctioneers, agents, and all persons holding similar relations of confidence, and declaring that such purchases are not void, but voidable only at the election of the *cestui que trust*, the court say (p. 286):

"But the plaintiff also complains of this part of the charge. Losing sight of the established distinction between actual fraud, which infects the act with radical nullity, and the constructive fraud, implied from the mere fact of purchase by a curator or trustee, where the taint is latent until the virus is stirred to activity by positive objection, he insists the court should have declared the sale to the defendant absolutely void, and asserted the plaintiff's right to recover unconditionally. This pretension is founded on the case of *Michoud* v. *Girod*, 4 Howard, 553, which his counsel seem to think goes the whole length of establishing the doctrine they contend for. But this, I conceive is an error. It is true that some of the language of the learned judge who delivered the opinion of the court, abstracted from the facts of the case and its actual determination, would seem to indicate his inclination to hold a purchase by a trustee, under any circumstances, as utterly and entirely void; but the decree pronounced, properly understood, is in accordance with the almost unbroken current of decision on this subject, to which I shall presently advert, for though it charges the estate of the purchasing trustee with the full value of the trust property, and directs an account of rents and profits received, it allows him full credit for all the substantial improvements made, and proper outlays incurred while the property remained in his hands. In these cases, as is justly observed by Story in his Treatise on Equity, Sec. 308, there is often to be found some intermixture of deceit, imposition, overreaching, unconsciona-

ble advantage, or other mark of direct and positive fraud; and it is pretty apparent there was so much of this present in *Michoud* v. *Girod*, as to give room for the strong remarks made from the bench. But the conclusion arrived at is by no means inconsistent with the doctrine stated by Lord Alvanley, in *Campbell* v. *Walker*, 5 Ves., 678. that "there is no rule a trustee can not be a purchaser; but however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable time to have a resale." Such a purchase, simply considered, is *malum prohibitum* and not *malum in se*, and is, therefore, capable of ratification. But though this be so, it is not sufficient to show that no advantage has been taken by the trustee, for the beneficiary may set it aside at his option. *Cane* v. *Lord Allen*, 2 Dow., 289, 299; 1 Story Eq., Sec. 312. The trustee purchases subject to that equity. He buys with that clog. But if the estate be again ordered for sale, it will be at the price the trustee gave, together with the amount of his *bona fide* and substantial improvements (*Ex parte* Hughes, 6 Ves., 617; *Ex parte* Bennett, 10 Ves., 381); or if the *cestui que trust* require a reconveyance of the estate, he must repay the original price, and all sums laid out for its permanent benefit and improvement, with interest, deducting the yearly value and interest. *York Building Co.* v. *McKenzie*, 3 Sug. on Vend., 160-1, 6th Am. Ed. The principles upon which the cases proceed are very clearly stated by the chancellor in *Rogers* v. *Rogers*, *supra*. "A trustee," says he, "can gain no advantage to himself to the detriment of those for whom he holds in trust. The most frequent application of this doctrine is to cases in which the trustee purchases the subject of the trust. The object is to secure fidelity on the part of the trustee, and to preserve the interests of those whose rights are intrusted to his care. To effect these objects, equity does not inquire for fraud on the part of a trustee who attempts to purchase, but it removes temptation by de-

claring him incapable of making a purchase, *which will bind those for whom he is interested, and gives them the option to vacate or affirm the purchase.*" He adds, "*they have no interest to vacate the purchase where the subject has been sold for its full value.*" To the same effect is *Den* v. *Wright*, 2 Hals. Rep., 175, where it was ruled that a deed made by an executor with power to sell to a third person to enable him to reconvey to the executor, *was not absolutely void, but voidable only by the cestui que trust* or his heirs."

"The distinction between positive fraud, which, by way of punishment, deprives the purchaser of the land bought without remuneration, and the effect attributed by policy to legal fraud, which works a divestiture on condition of repayment, is recognized by our own cases of *Chronister* v. *Bushey*, 7 W. & S., 152; *Rankin* v. *Porter*, *supra* (7 W., 387); *McGinn* v. *Schaeffer*, 7 W., 414; *Fisk* v. *Sarber*, 6 W. & S., 21; *Painter* v. *Henderson*, 7 Barr, 48; and *Wallington's Estate*, 1 Ash., 307." * * *

And again on p. 297, the court say:

"It is said that the interposition of Pennock as a bidder, is, in itself, a fraud destructive of the sale. His proposition, embodied by the last point submitted by the plaintiff, is said to be based on an observation which fell from Mr. Justice Wayne in *Michoud* v. *Girod*, that a purchase by a trustee or agent, *per interpositam personam*, carries fraud on the face of it. We are aware that in this abstract proposition, the learned judge is sustained by high authority: 4 Ves., 411; 14 Ves., 504. But by this it was not intended to intimate that the employment of a third person fairly to bid for a trustee, is absolutely destructive of the purchase *ab initio*, and as though it had never been. To this extent we cannot give it our assent. The books are full of such instances, but I think no case can be found in which such a fact was allowed to work a distinction in the rule by which equity measures the validity and de-

termines the binding efficacy of such purchases. We have seen that chancery does not denounce these transactions as morally wrong, but apart from express fraud will sustain them as vesting some, though a defeasible interest. If so, the substitution of a third party as a conduit for the transmission of title, would seem to be absolutely necessary. This necessity is noticed in *Chronister* v. *Bushey*, 7 W. & S., 152, where, after stating the general rule, that equity forbids a trustee to acquire an indefeasible estate as against his *cestui que trust*, by purchase at his own sale, it is said, where he himself is a bidder the contract is void, even at law, for *want of parties;* for an individual cannot contract for himself, or convey to himself; and where the legal objection is obviated by the interposition of an agent, equity allows the sale to be avoided at the election of the *cestui que trust*, who may set it aside *without regard to its fairness.* In *Rham* v. *North*, 2 Y., 117, it is observed, a trustee cannot convey to himself; a title can only be derived through a third person; and in *Bruch* v. *Lantz*, 2 R., 392, direct and indirect purchases by trustees are treated as standing on the same ground, both being voidable, but not void."

Beeson v. *Beeson*, 9 Barr., 299.

In the case of *White* v. *Isclin*, 26 Minn., 487, a guardian had purchased real estate at his own sale, *per interpositam personam*, and had afterwards conveyed the land to a *bona fide* purchaser without actual notice.

The statute regulating such sales, Gen. St. 1878, C. 57, Sec. 41, provides that "no executor, administrator or guardian, making the sale, shall directly or indirectly purchase, or be interested in the purchase of, any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void."

The court, after reviewing the decisions of other states upon similar statutes, and referring to cases in which courts have

construed the word "void" in statutes as having the effect of "voidable" only, holds that notwithstanding the language of the statute the sale in question was not absolutely void, but was only voidable by the parties interested in the estate sold, and could not be avoided even by them, as against a *bona fide* purchaser.

The subsequent decisions of the United States Supreme court on this subject, sustain the foregoing views as to the proper interpretation of the decision in *Michoud* v. *Girod*, and are in harmony with that case as thus construed.

In *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. R., 587, a bill was filed to set aside a purchase by a director of the property of the corporation. The court said:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality and which has received the clearest recognition in this court and in others. *Koehler* v. *Black River Falls Co.*, 2 Black, 715; *Drury* v. *Cross*, 7 Wall., 299; *Luxemburg R. R. Co.* v. *Magnay*, 25 Beav., 586; *The Cumberland Co.* v. *Sherman*, 30 Barb., 553, 16 Md., 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say this is the general rule, for there may be cases where such contracts would be *void ab initio;* as, where an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale."

Badger v. *Badger*, 2 Wall., 87, was a bill filed by the heir

to set aside a purchase by an administrator of the trust estate. *Marsh* v. *Whitmore*, 21 Wall., 178, was a purchase by an attorney at his own sale of the bonds of his client. In each case the court held the purchase was voidable only by the *cestui que trust*, but the remedy was barred by laches and acquiescence.

In *Thomas* v. *Brownville, etc., R. R. Co.*, 109 U. S. R., 525, on a bill to foreclose a railroad mortgage, made to secure bonds issued to a construction company, there had been a foreclosure decree and sale. Then stockholders intervened, praying to set aside the sale and the mortgage on the ground of fraud. The fraud set up in their answer and cross-bill, and proven, was (1) that two of the directors of the company were interested in the construction contract; (2) that the parties securing the construction contract assumed the liability of all of the directors on their unpaid stock subscriptions, and relieve them therefrom. The Circuit court held the construction contract as well as the bonds, absolutely *void*, and dismissed the bill. The Supreme court reversed the decree on the following ground, as stated in the opinion:

"But, as this court said in the case of the *Twin Lake Co.* v. *Marbury*, 91 U. S. R., 587, such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity."

These cases establish the doctrine that such contracts or purchases are voidable only, and not absolutely void, as the settled

rule of the Supreme court, and bring the decisions of this court into perfect harmony with the general current of authority, as declared by the highest courts of England and of the several states of this country.

III.

CASES CITED BY DEFENDANTS BELOW AS TO PURCHASES BY RECEIVERS. THE RULE GOVERNING PURCHASES BY OTHER FIDUCIARY AGENTS APPLIED.

The case of *Ashuelot R. R. Co.* v. *Elliott*, 57 N. H., 397, is urged as an authority that complainant's interest in the purchase of the bonds was void. This was a bill by the corporation and several stockholders, in other words, the *cestui que trustent*, against Elliott, who had taken possession of the railroad as trustee for the mortgage bondholders. The bill prayed an accounting in regard to the proceeds of certain bonds bought by Elliott and to redeem. The case was in no wise different from the other cases on the subject of purchases by trustees. There is no intimation by the court that the transactions in question should be considered void. On the contrary, they were enforced, and Elliott held to account for the profits to the beneficiaries.

The counsel for the plaintiffs, in their brief in that case (page 422), laid down the rule thus:

"The *cestui que trust* alone may repudiate the trade and take its gains." Citing: *Jackson* v. *Van Dalfsen*, 5 Johns., 43, 48; *Jackson* v. *Walsh*, 14 *Id.*, 407, 415; *Wilson* v. *Troup*, 2 Cow., 196, 238; *Hawley* v. *Cramer*, 4 *Id.*, 719; *Jennison* v. *Hapgood*, 7 Pick., 1; *Thorp* v. *Cullom*, 1 Gilman, 615, 627, and *Richardson* v. *Jones*, 3 Gill. & John., 164, 184.

All of which cases are relied upon by us, and are clear to the point that such purchases are voidable only and not void. The court sustained this view and directed an accounting, and

the language of the court in the opinion should be considered with reference to the question as raised in a suit brought directly by the *cestui que trustent* against their trustee. Elliott had been clerk and treasurer of the railroad company for twenty years, and was also trustee in the mortgage. When he took possession it was supposed that an act of the legislature had had the effect of foreclosing the mortgage; but after several years the court, in 52 N. H. 387, between the same parties, held the statute had no such effect, and that Elliott was in possession as trustee. As to the right of Elliott, while trustee in possession, to buy the bonds, even as against his *cestius que trustent* in a suit brought directly by them, the court say:

"We need not now deny his right, so far as regards the other bondholders, to buy the bonds fairly, in open market, taking no advantage of his position and the knowledge gained therefrom to overeach the seller; although a court of equity would undoubtedly scrutinize such a transaction pretty carefully, even when the purchase is made before the active duty of the trustee begins, and no interests are involved but those of the bondholders. Mr. Perry says as much: 'Doubtless they can purchase the bonds for which the mortgage stands as security, in open market; but they could not go among the bondholders and solicit the purchase of the bonds, for holding the security for the bonds, their position and influence would be such, and the danger of fraud so great, that a court of equity would not allow the bargain to stand.' (Perry on Trusts, Sec. 749.)"

Perry adds: "Their duty would be governed by the general rules that affect all trustees, modified to meet the exigencies of the case."

Applying this to the case at bar, we submit:

(1) These remarks are made in and apply only to a case where the objection is made by *cestuis que trustent*, and not

where, as in the case at bar, the objection is sought to be raised by third persons.

(2) The decision does not hold the purchases absolutely void as between the purchaser and third persons; but that the general rules which affect all trustees apply to the case.

(3) In the case at bar the bonds were, to the intents and purposes, "sold fairly in open market." They were sold openly and publicly under a written agreement entered into by a committee representing the bondholders, approved by their agents in America, and known to, and sanctioned by the court. The fact that complainant was interested in the purchase, exercised no influence upon the price of the bonds, and in no way influenced or affected the action of the bondholders. None of the parties thus selling the bonds have ever complained of any unfairness in the transaction, nor have they ever sought to set it aside. Under these circumstances, and especially as between Farley on the one side and Kittson and Hill on the other, Farley had a perfect right to purchase the bonds or to be interested in the purchase; and the case of *Ashuelot R. Co.* v. *Elliott*, on this point, is in harmony with the other cases on the general subject of purchases by trustees, hereinafter cited.

Among all the authorities urged by defendants' counsel below in support of the distinction he sought to draw between purchases by receivers and purchases by other classes of fiduciary agents or trustees, and the *only cases* cited by him in which the transactions considered were purchases by receivers of the property committed to their charge, are:

Alven v. *Bond*, Flan. & Kelly, 196.

Eyre v. *McDonnell*, 15 Ir. Chy., 534.

Neither of these cases in any manner sustains the distinction sought to be made by counsel, between purchases by receivers, which they maintain to be absolutely void, and purchases by other trustees and persons acting in confidential relations,

which by the unbroken current of American and English decisions are voidable only by beneficiaries and not by third persons.

And the doctrine of these cases is in no wise inconsistent with the decision in *Jewett* v. *Miller*, 10 N. Y. Rep., 402, in which a purchase by a receiver was hold voidable only at the election of the *cestui que trust*, and not absolutely void.

The case of *Alven* v. *Bond*, Flan. & Kelly, 196, was cited in our original brief in the Supreme court, as reported in 3 Irish Eq., 365. A much better and fuller report of the same case is found in Flanagan & Kelly's Reports, 196, by which it is cited in brief of counsel for defendants below.

That this case is a very strong authority for our position that a purchase by a receiver stands upon precisely the same footing as a purchase by any other person standing in fiduciary relations, and is governed by the same general rules which control purchases by trustees, agents, executors, guardians, assignees in bankruptcy and other person acting in confidential capacity, will be seen upon a study of the case.

This was a sale of land under decree of foreclosure. The receiver, Swanzy, through the interposition of a third person, was interested in the purchase of the trust property. The application was made by the *cestui que trust* to set aside the sale, which, after extensive discussion of authorities, was granted. This was strictly in accordance with the general rule applicable to purchases by trustees generally. Not a word in the decision intimates that the court considered the sale absolutely void, or that the sale would have been set aside at the instance of any other person than the *cestui que trust*. On the contrary, the court distinctly decides that a purchase by a receiver stands upon the same ground as purchases by any of the various classes of fiduciary agents, which are voidable by the *cestui que trust* at his election.

In the argument of counsel for the motion they say: "The

principle of the rule which prevents the purchase of the trust property by trustees, assignees, etc., *applies equally to a purchase by a receiver*."

The master of the rolls in his opinion said (p. 211): "I do not at all agree with the counsel for the purchaser who contend, that if the court shall set aside this sale, because the purchase was made in trust for the receiver, it will introduce a new doctrine into a court of equity, and make an order which no other judge ever before ventured to make; when I find it to be the general rule of this court, founded on principles of public policy, that trustees, assignees of bankrupts, solicitors or agents for the assignees, and all persons filling any confidential office in relation to the property to be sold, shall not, without the special leave of the court, and probably the assent of the parties interested, purchase the property with which they are by their office connected; I make no new decision if I apply that principle to a receiver, and hold that a purchase by him at a sale under the decree of this court, of the property over which he is acting as receiver, made without the sanction of the court, or the assent of the parties interested, but concealed from both, can not be sustained. I only apply a well established rule of the court to a case which I think fully within it, and show that this rule of a court of equity is, as Lord Cottenham says our legal system is, "capable of adapting itself to the exigencies of society."

Here, then, the master of the rolls expressly decides that the rule applicable to a purchase by a receiver is precisely the same rule applicable to purchases by "trustees, assignees of bankrupts, solicitors or agents for the assignee, and all persons filling any confidential office in relation to the property to be sold."

And what is the well established rule of equity which the court thus applies to a purchase by the receiver?

It is, as counsel for defendants would have us understand,

that such purchases are absolutely void? By no means. No case to that effect can be found. The rule is, that on the application of the *cestui que trust*, at his election, the sale will be avoided, it will not be sustained. But the rule is equally positive that as to all the rest of the world the sale is valid both at law and in equity. A stranger cannot avoid the sale. And that this is clearly the meaning of the court is shown further by the direct intimation of the court that if the sale to the receiver had been made with the special leave of the court, and the assent of the parties interested, the sale would be sustained even against the objection of the *cestui que trust*. Could this be held, if the sale were *ab initio* utterly and absolutely void as against public policy?

The very last authority discussed by the master of the rolls in his opinion, is clear to the point that a purchase by a receiver is voidable only and not void. The court says:

"It has never been, I believe, attempted to be contended for in this court, that a receiver could, either by himself or a trustee for him, become tenant under the court to any lands over which he is acting as receiver; the case cited from Mr. Smith's book is only one of many in which it has been stated that he could not, and there is an express decision of the late Master of the Rolls on this case, that a receiver cannot purchase, for his own benefit, at a sale under an order of the court. I allude to the case of *White* v. *Tommy*, in this court in 1836; in that case a receiver or manager had been appointed over an extensive furnished hotel; the brother of the receiver was the principal creditor of the defendant who had executed a deed vesting his property in trustees for his creditors; a sale of the furniture, and of the interest in the hotel, which was subject to a mortgage, having taken place under an order of the court by an auctioneer appointed by the master, the receiver became, at the auction, the purchaser of a large portion

of the furniture; an application was made to set aside the sale of the interest in the hotel, and the fact that the receiver had purchased at the auction having been disclosed, the late Master of the Rolls, in January, 1836, made an order directing the receiver to bring into court the sum for which he had purchased the furniture, and gave to the parties interested power to apply, during the term or the sittings after, for a resale of the goods purchased by the receiver, if they considered it for their benefit to do so; thus holding the receiver bound to pay the price he offered, if the parties considered it a fair price, but declaring that the sale could not be sustained if the parties interested objected."

This is as clear a decision, in effect, that the sale is voidable only by the *cestui que trust*, and not absolutely void, as could well be made, without laying down the rule in express terms.

Eyre v. *McDonnell*, 15 Ir. Chy., 534, also cited by defendant's counsel below, was a bill in equity, filed by the personal representative of the *cestui que trust*, against the receiver to set aside a purchase by the latter. The pith of the decision is stated in the head note: "Purchase of an annuity, at an under value, by a receiver, set aside in a suit instituted by the personal representatives of the vendor." It, therefore, comes within the rule which avoids such purchases at the election of the *cestui que trust*, and the language used in the decision is to be construed with reference to the manner in which the controversy was brought before the court in a direct suit between the receiver and his *cestui que trust*.

But this case, rightly considered, is a strong authority for our position, that purchases by receivers are subject to no other rules than those applied to purchases by all other classes of trustees and persons standing in confidential relations. The decision is mainly based upon the case of *Alven* v. *Bond;* and the Lord Chancellor, in his opinion, quotes from *Alven* v. *Bond*, one of the very passages upon which we rely to show

that there is no distinction, in law or equity, between a purchase by a receiver and a purchase by any other fiduciary agent. He says:

"What then was the character of this transaction, and can such a proceeding be sustained? It is a sale to a receiver of the very thing over which he was appointed, the annuity which it was his duty to collect. *Prima facie* the doctrines of this court are in direct opposition to such a transaction, and the position of a receiver has been compared in *Alven* v. *Bond*, and in the other cases, to that of other parties who have been declared incapable of purchasing the property held by them in a fiduciary capacity. In the judgment in that case the Master of the Rolls, Sir Michael O'Loghlen, expresses himself thus: "I do not at all agree with the counsel for the purchaser, who contend that if the court shall set aside this sale because the purchase was made in trust for the receiver, it will ihtroduce a new doctrine into a court of equity, and make an order which no other judge ever before ventured to make; when I find it to be the general rule of this court, founded on principles of public policy that trustees, assignees of bankrupts, solicitors or agents for the assignees, and all persons filling any confidential office in relation to the property to be sold, shall not without the special leave of the court; and probably the assent of the parties interested, purchase the property with which their office is connected—I make no new decision, if I apply that principle to a receiver, and hold that a purchase by him at a sale under the decree of this court, of the property over which he is acting as a receiver, made without the sanction of the court or the assent of the parties interested, but concealed from both, can not be sustained."

And as the decision in *Eyre* v. *McDonnell* is based upon the same grounds as that in *Alven* v. *Bond*, the remarks made in regard to that case apply here. It is as an express decision

that the same rule applies to purchases by receivers, which applies to purchases by other trustees; and that whenever the *cestui que trust* elects to avoid the sale, it will not be sustained. If the same rule applies, then we have all for which we contend. Because the rules governing purchases by trustees generally, are as firmly established both in England and the United States, in the Supreme court of the United States, and the courts of last resort in the several states, as any other fundamental doctrines of equity.

In *Mulford* v. *Minch*, 3 Stockton, 16, on a bill filed by the administrator, who had purchased the trust estate, against the *cestuis que trust*, to enjoin ejectment, and for a confirmation of the sale, or if the sale were held voidable, for an accounting and reimbursement, the court held, that if the complainant had been guilty of actual fraud, so that moral turpitude could be imputed to him, a court of equity would give him no relief. But actual fraud not having been proven, the sale was held voidable only, by such of the *cestuis que trust* as had not acquiesced, as to those who had acquiesced the sale was held binding; and an account of rents and paofits, of permanent improvements, and of the purchase money, was directed, and those defendants who had not confirmed the sale were given an opportunity to redeem.

In *Thorp* v. *McCullom*, 1 Gilm. Ill., 614, John McCullom died seized of certain lands, leaving a widow and three children. The widow and one Whiteside administered. At a sale to pay debts under the order of the court, Sarah McCullom, the widow and administratrix, became the purchaser of the lands, and Whiteside, the administrator, alone executed a deed to her, but omitted to recite at large the order of the court. The premises were subsequently sold by Sarah to one Dugger and by him to Thorp, who had had possession and made valuable improvements. The heirs of the intestate brought ejectment against Thorp for the land. The latter

filed this bill for injunction and to perfect the administrator's deed. The court below sustained a demurrer to the bill. The Supreme court said:

"The general principle of equity is that trustees and others sustaining a fiduciary and confidential relation, cannot deal on their own account with the thing, or the persons falling within that trust or relationship. The rule is not universal, but general. Whether Sarah McCullom, the administratrix and purchaser, falls within the general rule as to this sale, is the question before us in this case, brought by purchasers from her, but with legal notice of the defect in the deed by its being recorded."

After stating the general rule holding such purchases voidable only by the *cestui que trust*, the court said:

"The demurrer only raises a question of the legality of the sale. The sale is valid in equity as well as at law, unless the *cestui que trust* elects to avoid it. Then a court of equity may and will avoid it; a court of law cannot. The demurrer will not show the *will* of the party to avoid it. In *Munco* v. *Allaire*, 2 Caines' Cases, in Error, 183, the widow, who was entitled to an interest under a will, sold that interest to the executor. She afterward sold and conveyed to another. The executor filed a bill against both for a specific performance of his contract of purchase. The court sustained a demurrer to the bill, but it is observable in this case that the vendor had expressly elected to disaffirm, in selling and conveying to another, as shown by the bill. So the question may be regarded as open, so far as that case is concerned."

"In this case, the heirs set forth nothing upon the record showing whether they wish to avoid the sale or not. However inflexible the rule may be in annulling such sales, when objected to, it has no application except at the instance, and upon the election of the *cestui que trust*, or others having an interest for it would never be done at the instance of the purchaser,

and against the will of the *cestui que trust.* I am clearly of opinion that the demurrer ought to have been disallowed so far as the mere question of the legality of the sale was concerned."

In *Rice* v. *Clyborn*, 21 Ind., 80, a bill was filed to quiet title by purchasers from the trustee. It was held that the sale was voidable only by the *cestui que trust*, and that third parties could not raise the objection.

In *Dunlap* v. *Mitchell*, 10 Ohio, 117, a sale of the trust estate by one executor to another, for a fair price, without actual fraud, was held voidable only and not void. The bill filed by one of the heirs to set aside the sale was dismissed because of a subsequent ratification, and the cross-bill, filed by the executor who purchased, to affirm the sale, was sustained, and the relief he prayed decreed.

In *Baldwin* v. *Allison*, 4 Minn., 25, the plaintiff in error, bebeing an administrator, foreclosed a mortgage given by defendant in error, and at the sale purchased the land for himself and not for the estate. He then commenced this proceeding to enforce his purchase and obtain possession. The mortgagor set up that the sale was void, because the administrator bought the property in his own right. The court held the sale was voidable only by the *cestui que trust* and, in the absence of actual fraud, could not be questioned by third parties for this reason.

The court say: "It is a fiduciary relation that the administrator bears to the estate that he represents, which would prevent him from purchasing under a mortgage which he was foreclosing for the estate; but a violation of his duty in this respect may or may not be questioned at the option of the beneficiaries of the estate, but not by strangers. * * * The estate being satisfied, Allison has no right to complain, unless he can allege and show some fraud in fact."

And this case is affirmed in *Kent* v. *Chalfant*, 7 Minn., 487.

In *ex parte* Wiggins, 1 Hill's Chancery Rep. (S. C.), 353, on a bill filed by the assignees of Baker Wiggins, the court ordered a sale of his real estate by the commissioner, under the superintendence of the assignees, who were directed to join in the conveyance to the purchaser. At this sale R. B. Wiggins, one of the assignees, became the purchaser of the whole estate, and afterward filed this petition to confirm the sale. The court below held that the purchase "could neither be set aside nor confirmed, without knowledge of the will of other persons interested, who are not parties to this proceeding," and dismissed the petition. The Court of Appeals, while holding the sale voidable, ordered that an inquiry be made whether any of the creditors or parties interested desired a re-sale, and if not, that the petitioner's purchase should be confirmed.

In *Buell* v. *Buckingham*, 16 Ia., 284, a bill was filed to enforce the purchase by a trustee from his *cestui que trust*, by injunction against a judgment creditor whose lien accrued after the sale. DILLON, J., said:

"Now, the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void *ab origine* and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary in a reasonable time, to say that he is not satisfied with it. It is valid in equity as well as at law, unless the parties interested repudiate it, or complain of it; and these may set it aside without showing either fraud or injury. *Bank of Old Dominion* v. *Dubuque Railroad Co.*, 8 Iowa, 277; *Davou* v. *Fanning*, 2 Johns. Ch., 252; *Bostwick* v. *Atkens*, 3 Comst., 53, 60; 1 Parson's Cont., 75, 76, and cases in note; 1 Lead. Cas. in Eq., 167; *MacGregor* v. *Gardner*, 14 Iowa, 326, 335."

"As the principal or parties interested may confirm the sale,

a mere stranger cannot make the objection that the trustee was the purchaser, or that the sale was irregular. The remedy belongs only 'to persons who had an interest in the property before the sale, and no other person can apply to set nside the sale.' *Hawley* v. *Cramer*, 4 Cow., 717, 744; *Edmundson* v. *Welsh*, 27 Alb., 578, 5 *id.*, 428; *Hannah* v. *Carrington*, 18 Ark., 85, 16 Ala., 581; *Greenleaf* v. *Queen*, 1 Peters, 138, 5 Barr., 97; *Wightman* v. *Doe*, 24 Miss., 675."

In all these cases the purchaser himself came into a court of equity for relief, or for the confirmation of the voidable sale. The fact that he appeared as complainant and not as a defendant, in no wise affected the application of the rule, that such purchases can only be objected to the *cestui que trust*.

IV.

THE OTHER CASES CITED BY DEFENDANTS BELOW DO NOT RELATE TO PURCHASES BY RECEIVERS.

In addition to the cases of *Ashuelot R. Co.* v. *Elliott*, *Eyre* v. *McDonnell*, *Alven* v. *Bond*, and *Michoud* v. *Girod*, which have already been discussed herein, counsel for defendants below, in support of his proposition, that complainant's agreement to become interested with Kittson and Hill in the purchase of the bonds, was utterly void, by reason of complainant having been at the time receiver and general manager, cited the following cases:

Fuller v. *Dame*, 18 Pick., 472 (agreement by stockholders for a consideration, to influence directors in location of railroad terminals, etc.); *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. Div., 549 (agreement to influence giving of contract for repairs); *Bollman* v. *Loomis*, 41 Conn., 581 (agreement to influence one relying on plaintiff in the purchase of a piano for a commission of $20); *Byrd* v. *Hughes*, 84 Ill.,

174 (agreement by agent to procure the discharge of his principal's attorneys, and hire defendants for one-half of the fees); *Swan* v. *Chorpenning*, 20 Cal., 182 (contract to withdraw bid for carrying mails); *Lucas* v. *Allen*, 80 Ky., 681 (contract by clerk of board of aldermen to help prosecute suit against the city); *Forbes* v. *McDonald*, 54 Cal., 98 (contract to resign as trustee in favor of another); *Noel* v. *Drake*, 28 Kan., 265 (same by cashier of a bank); *Bowers* v. *Bowers*, 26 Pa. St., 74 (contract by person entitled to administration to renounce, etc.); Miller's Appeal, 30 Pa. St., 478 (contract by executor and trustee with heir, that former should receive part of estate if trusts were set aside); *Ellicott* v. *Chamberlain*, 38 N. J. Eq., 604 (contract by executor to renounce in consideration of money to be paid); *Richardson* v. *Crandall* 48 N. Y., 348 (suit to recover county bonds pledged with United States Provost Marshal as security that men enlisted by him should not desert).

Counsel for defendants below also cited to support the same proposition, the following cases in this court:

Bartle v. *Coleman*, 4 Peters, 184.
Randall v. *Howard*, 2 Black., 585.
Marshall v. *B. & O. R. R. Co.*, 16 How., 153.
Trist v. *Child*, 21 Wall., 441.
Tool Co v. *Norris*, 2 Wall., 45.
Meguire v. *Corwine*, 101 U. S., 108.
Oscanyon v. *Arms Co.*, 103 U. S., 277.
Wheeler v. *Sage*, 1 Wall., 518.
Brown v. *Tarkington*, 3 Wall., 378.
Selz v. *Una*, 6 Wall., 327.
Coppell v. *Hall*, 7 Wall., 542.

Bartle v. *Coleman*, 4 Peters, 184, was a case of gross actual fraud. BALDWIN, J., delivering the opinion of the court, said:

"The case then presented for the consideration of the Circuit court, and now before us for revision, is this: A contract

made by the complainant with a public agent, a deputy quartermaster-general, to an amount exceeding $50,000, in the profits of which he was to participate, false measures attempted to be imposed on the governmene; the fraud discovered by the vigilance of its accounting officers; and a bill in equity filed to compel an alleged partner to account for and pay to one of the parties in such a transaction, the one-half of a loss sustained by an unsuccessful attempt to impose spurious vouchers on the government."

Randall v. *Howard*, 2 Black, 585, was a bill to enforce a contract made to injure a third person, by fraudulently using the process and decrees of the court, and to restrain defendant from disposing of lands he had bought at a foreclosure sale, ratified by the court, under a decree entered by consent of complainant. The court held the agreement was absolutely void; that the bill was demurrable on its face under the Statute of Frauds; and that the court would not set aside or enjoin the enforcement of the decree entered by the State court which had jurisdiction of the parties and the subject-matter.

Marshall v. *B. & O. R. R. Co.*, 16 How., 153, was an action at law; and *Trist* v. *Child*, 21 Wall., 441, was a bill in equity, brought to enforce contracts for contingent fees for services in procuring and influencing legislation. *Tool Co.* v. *Norris*, 2 Wall., 45, was a suit at law brought on a contract for contingent fees for procuring a government contract. In each case the court held the contract absolutely void.

Meguire v. *Coleman*, 101 U. S., 108, was an action brought on a contract to procure defendant to be appointed special counsel for the United States in certain cases for one half of the fees. *Oscanyon* v. *Arms Co.*, 103 U. S., 277, was a suit on an agreement to corruptly influence the action of government in awarding contract for purchase of arms.

Wheeler v. *Sage*, 1 Wall., 518, was a bill to compel Sage to account to his copartners for the proceeds of certain mort-

gaged property, which a third person had brought in, partly on Sage's account. It was dismissed on the ground, (1) that the transactions were outside the scope of the partnership business, and that the alleged contract to share the profits was not proven, hence Sage was not liable as a trustee; (2) that the profits were the result of a fraudulent scheme by which a foreclosure decree was taken for a much larger amount than was due, by collusion, to the injury of other creditors. The proofs showed actual fraud, and the court held the transaction void.

Brown v. *Tarkington*, 3 Wall, 378, was a suit at law against defendants as stockholders of a bank in the Territory of Nebraska, to recover moneys advanced by plaintiff to redeem paper of the bank in circulation, and for a balance due. The bank began business in September, 1857, and ceased in May following, with an outstanding circulation of its bills of some $90,000.

The plaintiff was held not entitled to recover, on the ground that the charter and organization of the bank, and the banking business carried on, were all in violation of the express provisions of the act of Congress, and were absolutely void, of all of which the plaintiff had actual knowledge.

Selz v. *Una*, 6 Wall., 327, was a bill to enforce, by injunction, against the *bona fide* assignees of a judgment, a secret agreement, of which they had no notice or knowledge, that if two of several defendants at law would abstain from participating in the defense, the judgment should not be collected from or enforced against them. The court held this operated as a fraud on the other defendants at law, and would not be enforced.

Coppell v. *Hall*, 7 Wall. 542, was a suit brought directly to enforce a contract, which the court pronounced absolutely void, as contrary to public policy, to the law of nations, to the act of Congress, to the proclamation of the president, and to

the regulations of the treasury department. The maxim *ex dolo malo*, etc., was applied.

All the foregoing cases, not only those decided by this court, but also those decided by the several state courts, excepting only *Richardson* v. *Crandall*, *supra*, were cited, and many of those cases were strongly urged and relied upon by counsel for appellees, both in their briefs, and on the former argument and re-argument of the case at bar in this court. All of them were cases in which actual fraud—fraud in fact—as distinguished from constructive fraud, was both alleged and proved; or in which the contracts or transactions were held absolutely void on some well-established rules of law quite distinct from the doctrines applied to purchases by trustees.

These cases are found in the same reports, both State and Federal, side by side with the numerous cases cited by us, in which purchases by the various classes of fiduciary agents we have enumerated were discussed, considered, and held voidable only. In none of the cases cited by appellees' counsel was any reference made to the numerous authorities holding purchases by fiduciary agents voidable only, nor was any decision announcing that doctrine considered, reversed, or overruled. Counsel for appellees have not attacked the soundness of the rule of law and equity upon which we rely; nor has they questioned any of the numerous authorities upon which the rule is based. It is tacitly admitted, and the authorities cited show, that if complainant had been an executor, administrator, guardian, director, trustee, assignee in bankruptcy, agent, sheriff, commissioner in chancery with power to sell, or had acted in any other fiduciary capacity than that of receiver, his purchase, or his interest in the purchase of the trust property would have been voidable only by beneficiaries, and not by strangers; and the objection of the voidable character of the agreement to purchase, could not be raised by these appellees.

The argument of appellees' counsel is that contracts or

purchases by receivers are governed by totally distinct and different rules from those applied by courts of law and equity to contracts and purchases by any other of the several classes of fiduciary agents above named. And that while the latter, in the absence of actual fraud, are voidable only, the former are *ipso facto* infected with moral turpitude, and are absolutely void.

There is no ground in reason for the distinction thus sought to be drawn; it is not supported by the dictum of any respectable text writer, nor by the authority of any adjudicated case or legal decision; and it is totally repugnant to all the analogies of the law, as well as to the very authorities cited in its support.

This is the distinction which counsel for appellees sought to maintain, and which they asked this court, on the former hearing to establish and apply to the case at bar.

Such a decision would have been, in every sense of the term, a new departure; a departure from a rule of universal application, and which is as well supported, both upon reason and authority, as any doctrine known to the law.

The whole effort of counsel for appellees has been, and necessarily must be, to take the case at bar out of the line of authorities cited by us, holding such contracts and purchases voidable only; and to bring it within the line of authorities cited by them, gathered together from all available sources, in which various contracts and transactions are held absolutely void for actual fraud, or for other reasons. None of these latter cases, however, were cases of purchases of the trust property by any class of fiduciary agents.

Although this court, in its former opinion, did not, in terms, pass upon this question, it seems to us, that by the action taken, in reversing the decree dismissing the bill, in overruling the plea, and in requiring the defendants to answer on the merits, the court has practically decided and settled, against the ap-

pellees, this controversy as to the line of cases to which the case at bar belongs.

All the facts relating to the fiduciary positions held by complainant as receiver and general manager were fully before the court, and are stated in detail in the opinion rendered; they were particularly set up in the plea, and were admitted to be true by stipulation; and the fact that complainant, while receiver and general manager, entered into the agreement and engaged in the enterprise of purchasing the bonds, and thereby acquiring the property of which he was receiver and general manager, was averred in the bill and conclusively admitted by the plea. If then, as defendants' counsel contends, such an agreement by a receiver *ipso facto* involves moral turpitude, and even in the absence of actual fraud, is absolutely void, it would seem this court would have taken no other course than to affirm the decree of the court below which dismissed the bill.

V.

BROOKS V. MARTIN AND KINDRED CASES IN THE SUPREME COURT.

In our former briefs filed, and upon the former argument and reargument in this court, we maintained, upon the numerous authorities cited and hereinbefore referred to, that the fact that complainant, while receiver, was interested in the purchase of the bonds and of the railroad properties, did not render his contract *ipso facto* fraudulent, unlawful, or void; that, at most, it could only be avoided by stockholders, bondholders or creditors; that as against the defendants herein it was and is valid and enforceable, and they have no right to raise the objection that it is invalid. In this respect it comes within the principle of *Harvey* v. *Varney*, 98 Mass., 118.

This was a bill in equity by one partner against his copartners in the manufacture and sale of boots and shoes alleging that they wrongfully withheld from complainant his interest in the partnership property, praying for an account, receiver, etc. The defense was that the purpose of the partnership was fraudulent, and evidence was introduced to show that it was formed for the purpose of transferring to it the property of a former firm, which was insolvent at the time of the transfer, and that this transfer was made to defraud the creditors of that firm. The Supreme court of Massachusetts held: (1.) That a contract, whether executed or executory, for the conveyance of either real or personal property, to conceal it from attachment by the grantor's creditors, although voidable by such creditors, is valid as between the parties, even though the grantee shared in the fraudulent intent. (2.) That the fraudulent character of the purpose of a partnership as to creditors, is no defense to a bill in equity, brought by one of its members against the others for a settlement of the affairs of the firm.

The learned justice who delivered the opinion of the court said:

"In this commonwealth a long series of cases has established the rule that a transfer, either of real or personal property, made with a view to defraud the creditors of the grantor, although the grantee has participated in this intent, is good between the parties, and void as against creditors only; or, to speak more accurately, is voidable by creditors at their election. If no creditors intervene, the conveyance stands; if creditors elect to affirm the transfer and receive the consideration, it is thereby ratified and confirmed. Payment of the grantor's debts to the full value of the property purges the fraud. *Drinkwater* v. *Drinkwater*, 4 Mass., 354; *Oriental Bank* v. *Hoskins*, 3 Met., 332; *Crowninshield* v. *Kittridge*, 7 Met., 520. This doctrine is not restricted

to executed contracts, but such as are executory merely are likewise treated as valid between the original parties, although they were entered into for the purpose of keeping the creditors of the vendor from attaching the property. *Knapp* v. *Lee*, 3 Pick., 452. In *Dyer* v. *Homer*, 22 Pick., 253, this precise point was decided, and it was held that a note given for the price of chattels for the express purpose of keeping them from attachment by the creditors of the vendor, who by agreement retained possession of the property after the sale, was valid, and that the sale itself between the parties must be treated as fair and obligatory. This case was twice before the court, the first opinion being pronounced by Mr. Justice Martin, in 1839, and the second by Chief Justice Shaw, in 1840, both announcing the same doctrines, and fully stating the reasons in their support. It was declared that the parties to a contract can not be allowed to defeat it by alleging their own fraud; that the transaction was not *turpis causa* and therefore void, but was valid until avoided, and that the note given for the price was good in the hands of the vendors, and could be enforced for the residue, after a partial failure of consideration caused by a levy on a portion of the property, sold by a creditor of the vendor. See, also, The Lion, 1 Sprague, 40. These authorities are decisive of the law in this commonwealth, and render it unnecessary to make a particular examination of the cases elsewhere cited by the defendant."

The court, after considering various cases cited *contra*, further say:

"The question whether an account between the members of the new partnership should be refused, and each be allowed to retain the share which happens to remain in hands, without regard to equality, depends upon similar principles. There was no element of illegality or immorality in the business of the firm. Because the plaintiff's interest was that of a silent partner, and was kept concealed in order that it might

not be attached by his creditors, the defendants who participated in this purpose can not be allowed to disclose the common fraud of both parties, and thereupon appropriate to themselves his share of the capital and profits of the partnership. Except so far as creditors intervene, to assert their rights, the interests of the several partners must be adjusted as if no such fraudulent purpose existed. To hold otherwise, and to apply to this case the maxim, *in pari delicto potior est conditio defendentis*, would be to exercise rigor beyond the limits of wholesome severity."

Harvey v. *Varney*, 98 Mass., 118.

We also insisted, as we now insist, that, even if appellees were correct in their position that the contract and agreement entered into between Mr. Farley on the one hand, and Kittson and Hill on the other, to purchase the bonds and use them in payment for the mortgaged property at the foreclosure sales, was unlawful and invalid (which we do not admit), still, under the doctrine of *Brooks* v. *Martin*, 2 Wall., 70, and other kindred cases decided by the Supreme court—the agreement which is alleged to have been illegal having been completely carried out by the purchase of the bonds, and through them of the mortgaged property—the defendants will not now be permitted to defraud complainant of his share of the profits in their hands by raising the objection of the illegality of the original agreement.

McBlair v. *Gibbs*, 17 How., 232.
Brooks v. *Martin*, 2 Wall., 70.
Planters' Bank v. *Union Bank*, 16 Wall., 499.
Miltenberger v. *Cooke*, 18 Wall., 421.
Railroad Co. v. *Durant*, 95 U. S., 576.

The agreement which is alleged to have been illegal by reason of complainant's interest in it, he being at the time receiver and general manager, was an agreement between com-

plainant, Jesse P. Farley, and defendants, Norman W. Kittson and James J. Hill, "that they would jointly undertake for their joint, mutual and equal interest, benefit, advantage and profit to acquire, by purchase or contract, all the bonds possible to be obtained of the First Division of the St. Paul and Pacific Railroad Company and of the St. Paul and Pacific Railroad Company, corporations created and existing under the laws of the State of Minnesota, and owning lines of railroad and other property in said state, which bonds had theretofore been issued by said respective companies, and were outstanding and for sale by the holders thereof at a large discount, and were secured by mortgages upon the lines of road and other property of said companies, and which mortgages were then in process of foreclosure in five several suits in courts in said state for default in the payment of the interest upon said bonds.

"The understanding, object, purpose and agreement of said parties in acquiring said bonds was to become the purchasers of said lines of railroad and other mortgaged property when offered for sale under decrees for the foreclosure of said mortgages, and to turn in and use said bonds in payment, or part payment therefor, and thereby, through and by means of said bonds, acquire said lines of railroad and other property." (Rec., 4.)

This contract was completely executed and carried out when the bonds had been purchased, the most of them under an agreement with the holders, which was approved by and referred to in the orders of the court, and when these bonds had been turned in in payment for the railroad lines, etc., as provided for in the foreclosure decrees. The decrees were entered in March and April, 1879, the sales were made in May and June, 1879, and were confirmed by the court (Rec., 32); and all of the lines of railroad and mortgaged property were purchased by, and turned over to the defendant, the St.

Paul, Minneapolis and Manitoba Railway Company, which together with the other defendants, now holds the same in trust for all the parties interested in such purchase, including complainant.

This bill is filed, not to enforce the original agreement, not to compel Kittson and Hill to go on and purchase the bonds, or to raise the necessary funds for that purpose, or to use the bonds in paying for the railroads; nor is it brought to compel the bondholders to perform their agreement to sell the bonds on the terms stipulated. All this has been accomplished and performed, and this bill is filed, after the original contract has been fully completed, for an accounting, the enforcement of a trust, to compel the turning over to complainant of his share of the profits now in the possession of the defendants.

McBlair v. *Gibbs*, 17 How., 232, was a bill filed by the personal representatives of Goodwin, to recover against the executors of Oliver, possession of a fund which arose from Goodwin's interest in a claim against Mexico, under a contract with General Mina for advances and supplies, in fitting out a military expedition against the dominions of the King of Spain. The defense was an assignment by Goodwin to Oliver in 1829. It was replied that the contract with General Mina being illegal, the assignment was also illegal, and no interest, equitable or legal, passed to Oliver's executors.

The Supreme court, after holding that the original contract was illegal and incapable of being enforced in a court of justice, said:

"But if the party who might set up the illegality chooses to waive it and pay the money, he cannot afterwards reclaim it. And if even the money be paid to a third person, for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself. In *Faikney* v. *Rynous*, 4 Burr., 2,069, where two

persons were jointly concerned in an illegal stock-jobbing business with a third, and a loss having arisen, one of them paid the whole and took a security from the other for his share; the security was held to be valid as a new contract, uninfected by the original transaction. And in *Petrie* v. *Hannay*, 3 T. R., 418, where one of the partners, under similar circumstances, paid the whole at the instance of the other, he was allowed to recover for the proportionate share. These cases are examined and approved in *Armstrong* v. *Toler*, 11 Wh., 258.

"In *Tenant* v. *Elliott*, 1 B. and P., 3, the defendant, a broker, effected an insurance for the plaintiff, which was illegal, being in violation of the navigation laws; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. The plaintiff recovered on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract not affected by the illegality of the original transaction. The same principle was applied and enforced in the case of *Farmer* v. *Russell*, 1 B. and P., 296." The court also cited with approbation, *Sharp* v. *Taylor*, 2 Ph. Ch. R., 801, and *Thompson* v. *Thompson*, 7 Ves., 470.

Brooks v. *Martin*, 2 Wallace, 70, was a bill in equity filed by Martin to set aside, on the ground of fraud, a contract of sale he had made to Brooks of his interest in a partnership venture, for an account and division of the profits. The defense was that the business of the partnership, from which the profits resulted, was the buying of *claims* for bounty land and scrip, long before any scrip or land warrants were issued by the Government; which was an illegal traffic, forbidden by act of Congress of February, 1847, and against public policy. The ninth section of the act provided that any sale or contract

going to affect the title or claim to any such bounty made *prior* to the issue of such warrant, should be "*null and void to all intents and purposes whatsoever.*" That, accordingly, the plaintiff could have no relief in a court of equity against his co-partner, even if it were made to appear that the latter realized a large sum out of the venture, and defrauded the former of his share of the amount so realized.

The court said: "We think that, in point of fact, the allegation of the answer—that the traffic in which this firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the act of February 11, 1847, was to protect the soldier from improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him, and if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, "I refuse to proceed with this partnership, because the purpose of it is illegal," Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, "I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum which I require you to advance according to your agreement," Martin might have refused to comply with such a demand, and no court would

have given either of his partners any remedy for such a refusal. To this extent go the cases of *Russell* v. *Wheeler*, 17 Mass., 281; *Sheffner* v. *Gordon*, 12 East, 304; *Belding* v. *Pitkin*, 2 Caines, 149, and others cited by counsel for appellant, and no further.

"All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control all of these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which where illegal have become accomplished facts and cannot be affected by any action of the court in this case.

"In *Sharp* v. *Taylor*, 2 Phillips Ch., 801, a case in the English chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries, by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition she made several trips, which were profitable, and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with plaintiff for his share of the profits or acknowledge his interest in the ship. When plaintiff brought his suit in chancery in England, the defendant set up the illegality of the traffic and the violation of the navigation laws of both governments, as precluding the courts from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor COTTENHAM, and from his opinion we make the following extracts: 'The answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor (the defendant) received the money; and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defense by one, against the otherwise clear title of the other? Can one of two partners

possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts, and asserting title to money which has arisen from them, is distinctly taken in *Tenant* v. *Elliot*, and *Farmer* v. *Russell*, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*, 7 Vesey, 470.'

"These cases are all reviewed in the opinion of this court in the case of *McBlair* v. *Gibbes*, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us."

In *Planters' Bank* v. *Union Bank*, 16 Wall., 499, the court said: "Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when tney have been carried to the credit of the plaintiffs, the case is different. The court is not there asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal

transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin. Thus, in *Faikney* v. *Reynous*, 4 Burrow, 2069, a plaintiff was allowed to recover in an action on a bond given by a partner to his co-partner for differences paid in a stock-jobbing transaction prohibited by act of parliament. This was the case of an express agreement to pay a debt which could not have been recovered of the firm. *Petrie* v. *Hannay*, 3 T. R., 419, was a similar case, except that the partner plaintiff had paid the differences by a bill on which there had been a recovery against him, and his action against his co-partner for contribution was sustained. This was an action on an implied promise. *Ex parte Bulmer*, 13 Vesey, 316, goes much farther, and perhaps farther than can now be sustained. We are aware that *Faikney* v. *Reynous* and *Petrie* v. *Hannay* have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this court. *Armstrong* v. *Toler*, 11 Wheat., 258; *McBlair* v. *Gibbes*, 17 Howard, 236; *Brooks* v. *Martin*, 2 Wallace, 70. *Lestapies* v. *Ingraham*, 5 Barr, 71, is full to the same effect. We think, therefore, the court was not in error in refusing to affirm the defendants' points."

Respectfully submitted,

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Of Counsel for Appellant.

150 U.S. 572

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150 U.S. 572

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 56.

JESSE P. FARLEY,

Appellant,

vs.

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, as Executor of the last will of Norman W. Kittson, deceased, and THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,

Appellees.

A BRIEF AND ARGUMENT FOR APPELLEES.

JOHN MAYNARD HARLAN,
ASSOCIATE COUNSEL FOR APPELLEE,
THE ST. PAUL TRUST COMPANY, EXECUTOR.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

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Appellees.

A Brief and Argument for Appellees.

The purpose of this suit is to enforce appellant's alleged right to a share equal to that of Messrs. Hill and Kittson, respectively, in certain railroad properties, which were sold under foreclosure decrees in May and June, 1879, and were purchased by the appellee, The St. Paul, Minneapolis & Manitoba Railway Company, a corporation organized by Messrs. Hill and Kittson, and George Stephen and Donald A. Smith, for the purpose of succeeding to the title, ownership and management of the foreclosed properties. The properties so acquired are now, and were, at the time of the beginning of this suit, *repre-*

sented, as alleged in the bill, by the capital stock of the purchasing company, and appellant seeks to recover such part of said stock as *represents* his alleged interest in the railroad properties, and also his proportionate share of such bonds of the purchasing company as were not needed to defray the expenses of the purchase, and of the dividends and earnings of the said company, and of the proceeds of sales of lands belonging to said company and being a part of the property so acquired.

Mr. Kittson died after the suit was brought, and the St. Paul Trust Company, as executor of his last will and testament, was duly substituted as a party defendant.

By a clear and exhaustive analysis of the evidence, and an able marshalling of the facts in the case, appellees' chief counsel, as it seems to the writer, has demonstrated in his brief that the alleged agreement was in fact never made, and that the alleged conversations, wherein it is claimed the agreement was reached, never took place. An attempt to add to or improve the argument upon that question of fact would certainly be fruitless and might even mar what has been so ably done. This brief will, therefore, be limited to an effort, if possible, to supplement the argument of the chief counsel by a view of the law that seems to the writer to be conclusive of the case.

The positions that it will be sought to establish are:

I.

THE ALLEGED AGREEMENT IS WITHIN THE MINNESOTA STATUTE OF FRAUDS, THE PERTINENT PROVISIONS OF WHICH ARE AS FOLLOWS:

"SEC. 10. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning land or in any way relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the parties creating, granting, assigning, surrendering or declaring the same, or by their lawful agent thereunto authorized by writing."

"SEC. 12. Every contract for the leasing for a longer period than one year, or for the sale of lands, or any interest therein, shall be void unless the contract, or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is made, or by his authorized agent."

And in this connection it will be shown that the answer, denying, as it does, the making of the alleged agreement, lets in the defense of the Statute of Frauds.

II.

NO TRUST EXISTED IN APPELLANT'S FAVOR IN THE RAILROAD PROPERTIES PURCHASED AND ACQUIRED BY THE APPELLEE RAILWAY COMPANY, AND NONE EXISTS IN THE STOCK AND BONDS THAT REPRESENT THOSE PROPERTIES:

1. No *express* trust existed as to the railroads and lands, because none was declared or created by deed or conveyance in writing, and none exists as to the stock and bonds of appellee company, because none has, at

any time, been declared or acknowledged either in writing or otherwise.

2. No *constructive* trust, because no fraud is proved or even alleged. The taking of title by the defendant railway company is not alleged to have been in violation of the alleged agreement, but in harmony with it.

3. No *resulting* trust, because:

(*a.*) No consideration, adequate to raise such a trust, was furnished by appellant, or if he did furnish such a consideration, it was not at the time, or in a manner sufficient in law to raise such trust;

(*b.*) The Statutes of Minnesota (Chap. 43, Sec. 7) provide that "When a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as the alienee in such conveyance," except in favor of creditors of the person furnishing the consideration.

III.

NO RELIEF CAN BE HAD BY WAY OF A SPECIFIC PERFORMANCE OF THE ALLEGED AGREEMENT, BECAUSE:

1. No part-performance by appellant is shown, and nothing is even alleged to have been done by appellant that would constitute a part-performance by him of the alleged agreement, within the meaning of the last section of the Minnesota Statute of Frauds, which saves to courts of equity their power "to compel the specific performance "of agreements in cases of part performance of such "agreements."

2. But, assuming acts done by plaintiff, intended by him to be, and in fact being, in apparent part-performance

of *some* agreement, yet the so-called agreement, alleged and attempted to be proved, cannot be the basis of a decree by way of specific performance, because said alleged agreement:

(*a.*) Is incomplete and lacks the essential element of obligation.

(*b.*) Is without mutuality either of obligation or of remedy; and

(*c.*) Is vague, uncertain and indefinite, and is incapable of being specifically enforced by the court.

IV.

THE ALLEGED AGREEMENT, IF EVER MADE, WAS ILLEGAL, NULL AND VOID, CONFERRED NO RIGHTS WHATEVER UPON THE PARTIES TO IT AND ITS EXECUTION CAN NOT BE THE BASIS OF ANY RECOVERY BY ONE OF THE PARTIES AGAINST THE OTHERS.

Though this last proposition has already been discussed with a force and ability, that the writer could scarcely hope to equal, he may, nevertheless, venture briefly to support it and possibly to cite one or two additional authorities.

ARGUMENT.

I.

THE ALLEGED AGREEMENT WAS WITHIN THE BAN OF THE STATUTE OF FRAUDS.

The alleged agreement is set forth in the bill in the following language:

"That in the summer of 1876 he, appellant, and the defendants Kittson and Hill mutually agreed by and between themselves, each with the other, that they would jointly undertake for their joint, mutual and equal interest, benefit, advantage and profit, to acquire by purchase or contract all the bonds possible to be obtained of the First Division of the St. Paul and Pacific Railroad Company, and of the St. Paul and Pacific Railroad Company, corporations created and existing under the laws of the state of Minnesota, and owning lines of railroad and other property in the said state, which bonds had theretofore been issued by said respective companies, and were outstanding, and for sale by the holders thereof, at a large discount, and were secured by mortgages upon the lines of road and other property of said companies, and which mortgages were then in process of foreclosure in five several suits in the courts of said state, for default in the payment of the interest upon said bonds.

"The understanding, object, purpose and *agreement* of said parties in acquiring said bonds *was to become the purchasers of said lines of railroad or other mortgaged property*, when offered for sale under decrees for a foreclosure of said mortgages, and to turn in and use said bonds in payment or part payment therefor, *and thereby, through and by means of said bonds, acquire said lines of railroad and other property.*

"That the defendant, Kittson, represented that he could procure from one Donald A. Smith and other capitalists in Canada the necessary funds that would be required in such undertaking.

"And it was further agreed by and between your ora-

tor and said Kittson and Hill that if it should become necessary to do so, the said Kittson might use or give to said Smith or others, furnishing the required funds, an interest with them in said purchases and enterprise, but that the interest not so used or given should be retained and held for the mutual, joint and equal benefit of your orator and said Kittson and Hill.

"It was also then and there further agreed by and between your orators and said Kittson, that the details of the negotiations for procuring the necessary funds, and for the purchase of said bonds, should be principally conducted and managed by the said Kittson and Hill, and such person or persons as an interest in said enterprise should be given to for furnishing the funds therefor, and that your orator should furnish such facts, information and advice, and render such aid and assistance therein, from time to time, as should be required of him. That your orator had knowledge not possessed by any of the other parties as to the whereabouts and situation of said bonds, the rated value thereof by the holders, the mode whereby and the channels through which the same could be reached and procured, also in respect to the situation, amount, character and value of the lines of railroad and property mortgaged to secure said bonds, and in respect to the pending suits for a foreclosure of said mortgages, and that the services of your orator in respect to all of said matters, and his co-operation were indispensable to the success of said enterprise."

The foregoing allegations, comprising subdivision 1 of the bill, are all that the bill contains by way of setting forth the terms of the alleged agreement. The rest of the bill, down to the prayer, is concerned with showing what, as it is alleged, has been done, and what the defendants Kittson and Hill have refused to do towards carrying out the alleged agreement, and what the defendant railroad company, with previous notice of plaintiff's alleged rights, has done in furtherance of the alleged purpose of Messrs. Kittson and Hill to ignore those rights.

It is apparent that the central and paramount feature of this alleged agreement was that the parties to it and their associates should "become the purchasers of said "lines of railroad and other mortgaged property" (including, as is alleged, over one million acres of land), "when offered for sale under decrees of foreclosure." The mere order of statement, chosen by the pleader, cannot alter or affect the essential nature of the alleged agreement. The bonds were to be acquired not for speculation or re-sale at a profit, but, as alleged, for the definite, specified and *agreed* purpose "to turn in and use said bonds "in payment or part payment therefor, and *thereby*, "*through and by means of said bonds acquire said lines of* "*railroad and other property.*"

Acquisition of the bonds was to be but the *means* whereby most surely and economically to acquire the lines of railroad and the lands. What characterizes and determines the nature of the alleged agreement is not the chosen *means*, but the *declared and agreed final purpose.* The "enterprise" was the acquisition of the railroad properties, not of the bonds secured by mortgages on those properties. And this view of the agreement, patent upon its face, as set forth in the first subdivision of the bill, is confirmed by the whole frame and theory of the bill, and by the testimony of appellant and his witness and good friend, Fisher.

The bonds, it is alleged, were purchased "by and in "the name of said Smith, Stevens, Kittson and Hill, *but* "*for the purpose and with a view to their use in the pur-* "*chase of said lines of railroad and other property, when* "*offered for sale under foreclosure decrees;*" * * * and, as is alleged,

"Most of said purchases of said bonds were made

under an agreement with the holders thereof, whereby payment therefor was not to be made until decrees of foreclosure of the mortgages, given to secure the same, should be rendered, and *the lines of railroad and other property sold under such decrees, and acquired by said purchasers*, and a new issue of bonds made, secured by a new mortgage on the same property, whereupon it was optional with the seller of the bonds to demand cash at the agreed purchase price, or to take the new bonds of the newly to be organized company."

Moreover, as is alleged, "it was the understanding on the part of all said parties that, as soon as *said lines of railroad and other mortgaged property should be acquired by them under said decretal sales*, a new issue of bonds should be made by them or by the company to be organized by them to take, hold, manage and operate said property, and secured by a new mortgage upon said property of sufficient amount to cover and defray the cost of said bonds and all expenses *connected with the carrying out of said enterprise*," that is the enterprise of acquiring and becoming owners of the lines of railroad and other mortgaged property. (Rec., 6, 7.)

In other words, the railroad properties were to be bought, and the old bonds, which were to be used in payment or part payment for the properties, were themselves to be paid for either in bonds of the purchasers or of the new company, secured by mortgage on the same properties, or in cash raised by the sale of such new bonds.

The bill further alleges that the appellee The St. Paul, Minneapolis and Manitoba Railway Company was organized for the purpose of acquiring, taking, holding, operating and managing said lines of railroad and other mortgaged property, when they should be sold under foreclosure; that foreclosure decrees were entered, and that they severally provided, among other things, that in payment for the mortgaged property so ordered to be sold,

the said mortgage bonds and overdue coupons should be taken as cash for such an amount as would equal the dividend to which they would be finally entitled *pro rata* under the decrees; that said properties were, in fact, "all "bid in, purchased or acquired by" the said company; that "all of said bonds, which had been purchased as afore- "said, were turned in and used in payment of said lines of "railroad and property by the said Kittson, Hill, Smith and "Stevens"; that over 500 miles of railroad in the State of Minnesota, with the equipments appertaining thereto, and over one million acres of land in said state, and much other valuable property, and in all worth over $15,000,000 were *thereby* acquired and became vested in said defendant railway company, etc.; that the new company issued and negotiated its bonds, amounting to $8,000,000; "that said bonds and the proceeds thereof were used so "far as was necessary to pay *the cost of said bonds*, so "*purchased as aforesaid*, and all *other expenses* incurred "or incident to said *enterprise* of purchasing said railroad "properties and lands, and that the $15,000,000, capital "stock of the new company now *represents the said prop-* "*erty so acquired* by said railway company." The phrase "all *other* expenses," clearly indicates that "the *cost of* "*said bonds so purchased as aforesaid*" was simply one, though the chief one, of the *expenses* of *the enterprise* of purchasing the railroads and lands.

This view of the essential character of the alleged contract as being one concerning lands, and chiefly relating thereto. and as involving the purchase of the bonds only as a more certain and less expensive means to that end, is borne out by Mr. Farley's own testimony and by that of his assistant, Fisher.

In answer to question 83 (Rec., 71), put by his own

counsel, Mr. Farley, in undertaking to describe the alleged interviews which he says culminated in the agreement set forth in the bill, says; "Mr. Hill and Mr. "Kittson came into the office, and, after the compliments "of the day, Mr. Fisher being present with me, Mr. Kitt- "son broached the subject of the nature of their visit, by "saying that he had had a good deal of talk with Mr. "Fisher and with Jim Hill, (Jim, as he called him), about "the propriety of buying these bonds in view *of inherit- "ing the property at the foreclosure sales.*"

To question 85 (Rec., 73), he replied: "After my "consenting to go in with them, there was a great deal "said about the future management of the *property.* It "was to be under my control—the management; and on "account of my reputation that had been established "here in the management of the property, they both "agreed that I should retain the management of it."

And in reply to question 86, he says: "There was "a great deal said by Mr. Kittson and Mr. Hill, both "about the future management of the property, and its "prospective value, and Mr. Hill *figured up the number "of acres of land* that was then owned by the company, "and the *number of miles of finished railroad,* number of "locomotives, number of cars, terminal facilities in St. "Paul and Minneapolis."

In answer to question 88 (Rec., 74), Mr. Farley says, among other things: "The Dutch committee of bond- "holders, as it was known, held and had under their con- "trol a very large majority of each class of these bonds; "*and they were the bonds we wanted to buy to inherit the "property—could do it in no other way. At the fore- "closure sales the large majority of the bondholders would "be the purchasers.*"

To question 101 (R., 79), he replies, among other things: "Mr. Kittson said that he believed that he "could control the amount of money necessary through "Mr. Donald A. Smith and his associates—Stephens— "by giving them a two-fifths interest in the purchase of "the bonds and *property when inherited through the* "*sale of the mortgages being foreclosed.*"

Mr. Fisher, in answer to Question 127 (R., 369), on cross-examination by Judge Young, says: "It was Mr. "Hill and myself that was talking at the time. That is, "he knew where he could get it. There was nothing "said—the talk was about the price of the bonds—how "many bonds there were out; what they would amount "to at that price; *how much road there was completed,* "*and portion of the uncompleted road being graded; the* "*lands they were entitled to.*"

In reply to Question 141 (R., 371), Mr. Fisher says: "I don't know that Mr. Hill and I talked about buying "the bonds. I showed this thing to Mr. Hill, and showed "him what there was in it; what a man could do if he "had this money; what a transaction it would be; $750,- "000, if these bonds could be bought at that price, *would* "*take all this property.*"

His answers to Questions 149, 150 and 151 (R., 372), on cross-examination, were as follows: "They, (the "$15,000,000 issue of bonds), represented 140 miles of "completed road with the land grant." * * * "That "140 miles of completed road, with the land grant, ought "to have been worth $20,000 per mile." * * * "I "don't remember that we made any estimate as to the "total value of these bonds. $750,000 was recognized "by Mr. Hill, as well as myself, to be a very low price "*for the property that those bonds would take*, and it

" would be a very nice thing for anyone who purchased " them at that price."

In answer to Questions 210, 211 and 212, on cross-examination with the answers thereto, Mr. Fisher says:

" Then I went over the ground carefully with Mr. " Kittson, so far as the extension line was concerned— " the St. Vincent extension, more particularly—and told " him that there was 140 miles of completed road, and " they were entitled to the lands, and gave him a general " description of the thing. And when I had done that, " my recollection is that that was the the first time that " the First Division bonds were mentioned, because he " asked me about the First Division, and I think he said " if a man was going to do anything with the Extension " bonds, why not include the First Division? My recol- " lection is that that is about the way it was put. I told " him as near as I could about the First Division."

" I told him there were ten or eleven—eleven, I believe " it was—eleven millions of bonds of the $15,000,000 is- " sue sold, or about that, that had been sold, and that the " balance were put up as collateral for a loan, and that " they were quoted at five cents on the dollar."

C. Q. 212. " And that if they could be bought for that, " that was what the property would cost?"

A. " It would be $750,000. I think it was 320 miles " from St. Vincent to St. Cloud, and there was thirty-six " miles completed between St. Cloud and Melrose, and 104 " miles completed in the Red River valley, and then there " was a good deal of grading done north of Snake river. " I think it was graded to within twelve or thirteen miles " of the boundary line; I will not be positive about the " number of miles."

"Well, I don't know as I made any estimate, (of the "value of the property of the Extension Company). In "figuring about the Extension line, we always figured in "connection with that—the completion of the work. I "think I made some figures about what the land would "come to, even at the government price, $2.50 per acre. "I don't remember of making any estimate as to the real "value; that is, I don't remember of figuring out in dol-"lars and cents just what the whole thing would be "worth, or what the profit would be. I don't remember "as I gave him (Mr. Kittson) the value in dollars and "cents, (of the Extension lines and property). I stated "to Mr. Kittson that, if those bonds could be bought at "what they were quoted at, they would take 140 miles "of completed road; and I went on and stated the whole "thing—that they had thirty-six miles completed at the "south end and 104 miles in the valley. At that time I "could tell him exactly where the grading was done, and "where it was not. We had a general talk about it, "and went through the whole thing, and the *idea was* "*that $750,000 would buy 140 miles of completed road,* "*and the lands appertaining thereto.*"

The alleged agreement, being one not merely "concerning" or "relating to" lands, but one having for its avowed and only object the buying and holding of the railroad lines and lands should have been in writing. But confessedly it was not in writing, nor was there any memorandum thereof. There was not even so much as a reference or hint, in any of the mass of letters offered in evidence, of the alleged or any other agreement with Farley.

As said by Justice Brewer in his opinion in the case, when heard by him on the Circuit, "During all these "negotiations not a scrap of writing appears, which shows "that Mr. Farley had an interest." 39 Fed. Rep., 520.

All that is offered as evidence of the making of the agreement was the testimony of Mr. Farley and his assistant, Fisher, as to an alleged interview or conversation wherein it is claimed the alleged agreement was made. In fact, Mr. Farley testifies that he "urged" (upon Mr. Hill) "the necessity of reducing this matter of our un-"derstanding to black and white," that Mr. Hill was unwilling to do it at that time and that Mr. Farley made no further effort in that direction. (Rec., 121.)

The alleged agreement, if ever made, was therefore an oral agreement to join in the purchase of the lines of railroad and other property, including over 1,000,000 acres of land, when the same should be offered for sale under foreclosure decrees, and Mr. Farley is seeking to enforce his alleged right to a joint interest in the railroads and lands, which are now represented by the stock of the appellee railroad company and by the bonds of the company secured on the properties.

Such being then the nature of the agreement, is it not clearly within the prohibition of the Minnesota Statute of Frauds?

At the outset it is important to note the particular phraseology of the Minnesota statute, which seems broader and more radical than the original English statute.

By the tenth section of the Minnesota statute:

"No estate or interest in lands other than leases for a "term not exceeding one year, *nor any trust or power* "*over or concerning lands, or in any manner relating* "thereto, shall hereafter be created, granted, assigned, "transferred, surrendered or declared, unless by act or "operation of law, or by deed or conveyance in writing "subscribed by the parties creating, granting, assigning,

"transferring, surrendering or declaring the same, or by "their lawful agent thereunto authorized by writing."

And by the twelfth section:

"Every contract for the leasing for a longer period "than one year or for the sale of any lands or interest in "lands *shall be void*, unless the contract or some note or "memorandum thereof, expressing the consideration, is in "writing, etc."

If the alleged agreement, that Farley should have an interest in the properties equal to that of Messrs. Hill and Kittson respectively, contemplated that this interest should be received and held by them *in trust* for him, then it was attempted by oral agreement to create or declare a trust "concerning lands," "or in any (some) manner "relating thereto"—a thing which, under the tenth section of the statute, could not be done. Or if, on the other hand, the alleged agreement contemplated that Farley's alleged interest in the railroads and lands so acquired should be conveyed by Messrs. Kittson and Hill to Farley in consideration of the latter's services in aid of the enterprise, then the alleged agreement was an oral agreement for the sale to him of an interest in lands, which by the 12th section of the statute was "void."

The authorities are clear to the effect that an oral agreement to enter into the purchase of lands is *void* by reason of the statute.

Dunphy v. *Ryan*, 116 U.S., 491, is particularly apposite, because it arose under the Montana statute, which is almost *verbatim* the same as that of Minnesota. The plaintiff sued on a promissory note of the defendant, who admitted the execution and delivery of the note and that it had not been paid. By way of cross-action, the defendant set up

that $1,935.51 was due to him from plaintiff under a contract stated substantially thus in defendant's answer: The defendant was to effect the purchase of two-thirds of certain land upon the best terms possible for the joint use and benefit of himself and the plaintiff. Title was to be taken in the name of the defendant, and the plaintiff was not to be known in the transfer and purchase, until the purchase was completed and good title acquired by defendant, who was then to convey by deed to plaintiff an undivided third of the property; whereupon plaintiff promised and agreed to pay the defendant one-third of all moneys paid by him as consideration for the property and one half of all expenses. The plaintiff replied denying the making of the alleged contract. It appeared that there was no written agreement or memorandum thereof. This court, affirming the judgment of the lower court in favor of the plaintiff, said:

"This is simply an agreement of the defendant to con-
"vey to the plaintiff a tract of land for a certain consider-
"ation. It, therefore, falls precisely within the terms of
"section 132 above quoted. It is a contract for the sale
"of lands, and not being in writing signed by the vendor,
"is void. The circumstance that the defendant, not
"owning the land which he agreed to convey, undertook
"to acquire the title, instead of taking the case out of
"the statute, bring it more clearly and unequivocally
"within its terms. A contract void by the statute can-
"not be enforced directly or collaterally. It confers no
"right and creates no obligation as between the parties
"to it."

In *Randall* v. *Randall*, 2 Black, 585, it was held that "where the agreement concerns an interest in lands and "is in parol, it is void by the Statute of Frauds."

In *Howland* v. *Blake*, 98 U. S., 624, the court held that an oral agreement to buy lands at foreclosure and hold in trust for another, is within the Statute of Frauds. "It is a naked promise by one to buy lands in "his own name, pay for them with his own money, and "hold them for the benefit of another. It cannot be en- "forced in equity and is void." Citing:

Levy v. *Brush*, 45 N. Y., 589.
Richardson v. *Johnson*, 40 Wisc., 100.
Payne v. *Patterson*, 77 Pa. St., 134.
Bander v. *Snyder*, 5 Barb., 63.
Lathrop v. *Hoyt*, 7 Barb., 59.
Story, Eq. Jur., Sec. 1,201*a*, 11th edition.

See, also,

Parsons v. *Phelan*, 134 Mass., 109.

It is true that there is some conflict in the American decisions upon the question whether an oral agreement to engage as partners in buying and selling lands comes within the prohibition of the Statute of Frauds. Some decisions follow the English case of *Dale* v. *Hamilton*, 5 Hare, Ch. R., 379, which may be most briefly epitomized by adopting the language of Mr. Browne, in his work on the Statute of Frauds.

The plaintiff, being a surveyor and land agent, alleged that he proposed to the defendant's testator an arrangement, for the purpose of speculation, by which he and a third party were to furnish the capital for buying land, plaintiff to lay out the lots and effect the sales, and each of the parties to be interested one-third in the profits and losses.

It was admitted that lands were acquired under *some* general arangement, but denied that the plaintiff was, as

alleged, a partner therein; and the further question was made whether, if he was a partner in fact, the verbal proof or written proof, imperfect in view of the Statute of Frauds, of the alleged partnership, was sufficient to take the case out of the Statute of Frauds, in a case where the entire subject of the transaction was land, and the partnership grew solely out of that subject; and whether the cases in which that effect had been given to a partnership contract were not cases in which the dealing in land was only an incident to an already existing partnership business.

The Vice-Chancellor, Sir James Wigram, held that the plaintiff was not barred by the statute from recovering, if the alleged agreement was in fact made, and that fact he directed to be tried by a jury. It is to be noted that there was in fact a written declaration of trust signed by the defendant, and showing the existence of plaintiff's interest, so that the question of the sufficency of an oral agreement of partnership in lands, arose only because the plaintiff was not satisfied to have his interest measured by the written declaration of trust, claiming that it did not set forth and recognize the full interest that he in fact was to have under the oral agreement. Not satisfied with the decree that he obtained plaintiff appealed, and on appeal withdrew his claim to benefits in excess of those allowed him by the written declaration.

Lord Chancellor Cottenham considered that the question as to the sufficiency of oral proof of the agreement was therefore not involved in the case as presented on appeal, and that the written declaration of trust, signed by the defendant, acknowledging and declaring that he held a certain interest as trustee for the plaintiff, was a sufficient memorandum in writing to meet the require-

ments of the statute; "for," said the Chancellor, "there "is this distinction between agreements and declarations "of trusts. In the one it is the agreement itself, which is "the origin of the interest that must be in writing; in the "case of a delaration of trust, which is only the recogni- "tion of a pre-existing interest, it is the evidence of "recognition, and not the origin of the transaction, that "must be in writing."

The opinion of the vice-chancellor in this case of Dale against Hamilton is the foundation of those American cases that sustain and enforce oral agreements to deal in or buy and sell lands.

In contrast with *Dale* v. *Hamilton*, and the cases following in its wake, is the case of *Smith* v. *Burnham*, 3 Sumner, 435, the reasoning of which seems to be perfectly sound. There the plaintiff and defendant made an agreement to become partners in the business of purchasing and selling lands and lumber. Plaintiff made advances and then made purchases of land. Upon a bill for accounting and dissolution it was held that the bill must be dismissed because the contract was within the statute of frauds. Justice STORY said (p. 460):

"It has been ingeniously argued that the interest of "the plaintiff is in a moiety of the profits or proceeds of "the sale, and not in the land itself, and that therefore "at least, when the land has been sold by the defend- "ant the agreement attaches to the moiety of the pro- "ceeds. But the agreement, if good at all, attaches also "to the land at the time of the purchase, and it is then "an agreement for an interest by way of trust in the "land, a sort of springing trust; and it is in virtue of this "trust estate, and of this only, that any right can attach "to the moiety of the proceeds. The right to follow

"the proceeds is a right which, if it exists at all, flows "from the interest in the lands and the trust created in "favor of the plaintiff. It is not collateral but direct. " * * * (p. 461.) A contract for the conveyance "of lands is a contract respecting an interest in lands. It "creates an equitable estate in the vendee in the very "lands, and makes the vendor a trustee for him. A "contract for the sale of an equitable interest in "lands, whether it be under a contract for the "conveyance by a third person, or otherwise, is "clearly a sale of an interest in lands, within the Statute "of Frauds. (*Hughes* v. *Moore*, 7 Cranch, 176, 192–194.) "A partnership to buy contracts for the sale of land is a "partnership for the purchase of an equitable interest in "those lands. If the transactions are to be carried on by "and in the name of one partner, the partnership is to "create a trust for the other in those contracts, and con- "sequently if the agreement for partnership is by parol, "it is to create such trust by parol. This would bring "the case within the purview of the statute of frauds. In "conclusion," he says, "it seems to me that to admit the "plaintiff to recover in this case would break down the "whole operation and policy of the Statute of Frauds in "regard to trusts."

Smith v. *Burnham* has been cited with approval by this court in *Dunphy* v. *Ryan*, *supra*, and by the highest courts of a number of states of the Union, notably, of Massachusetts, in the case of *Parsons* v. *Phelan*, 134 Mass., 109; of Wisconsin in *Bird* v. *Morrison*, 12 Wis., 138, and of New York in *Levy* v. *Brush*, 45 N. Y. Ap.

But the case now before the court does not involve a choice between the two opposing camps headed by *Dale* v. *Hamilton* and *Smith* v. *Burnham*, respectively; for

there is no conflict whatever in the decisions, English or American, upon the proposition that where an oral agreement is made for the *purchase or acquisition of an interest in the land itself*, such agreement does not create a partnership but is purely an agreement to acquire an interest in common in lands, is within the Statute of Frauds, and cannot be enforced by any form of action. Where, in other words, the lands are to be purchased *with a view to sale* on joint account and division of the profits, an oral agreement is sustained in some jurisdictions; but where the lands are to be purchased jointly the purchasers to have either an undivided several interest in, or a moiety of the land itself, an oral agreement is without force and cannot *per se*, and unaided, be made the basis of a recovery of any nature.

That this distinction is well taken there can be no doubt. Even in the case of *Dale* v. *Hamilton*, Vice-Chancellor Wigram, in stating the difficulty from the standpoint of principle, in holding even that such an oral agreement as was there involved was efficacious, says:

"If A alleges that B agreed to give him an interest in "land the statute applies; but if he adds that the land "was to be improved and be sold at their joint risk for "profit and loss, then, according to the argument, the "statute does not apply," and he so held.

Precisely this distinction was made in the case of *Levy* v. *Brush*, 45 N. Y. Ap., 589. In that case the defendant had agreed to bid off land and make the contract of purchase in his own name, and to pay the consideration therefor for the joint benefit of himself and the plaintiff who was to reimburse the defendant for one-half the money so paid, whereupon the deed was to be taken in the name of both. The defendant took the contract in

his own name, but refused to convey a moiety of the lands to the plaintiff. Upon bill to restrain the defendant from taking the deed in his own name the court said:

"It is insisted by counsel for the respondent that "the agreement is not within the eighth section of the "Statute of Frauds, [2 R. S., 135, which section is nearly "identical with the twelfth section in the Minnesota "statute] for the reason that there was no agree ment for "the sale by the defendant of an interest in the lots to the "plaintiff; that the agreement between the parties was "that they should together contract for the purchase of "the land for their joint benefit, and the only sale con- "templated was not from one party to the other but from "the then owner to both parties. But this does not meet "the difficulty. If no valid contract for the purchase "had been made, the plaintiff would have had no remedy "against the defendant, although the failure to make such "contract was wholly from the default of the defendant. "In other words, an action will not lie by one party "against another for the breach of a verbal agre ement "to unite with him in the purchase of a designated piece of "land, the title to be taken by them in common. * * * "If the plaintiff acquired any interest in the contract for "the purchase of the lots made by the defendant, or in "the equitable title to the land thereby acquired, it was "upon the ground that such contract was obtained pur- "suant to the agreement of the parties, and, that to- "gether with the equitable title, was held by the defend- "ant, under the agreement, for the benefit of both parties. "Precisely here the plaintiff encounters the sixth section "of the statute [which is identical with the tenth section "of the Minnesota statute], which provides that no es- "tate or interest in lands, other than leases for a term

"not exceeding one year, nor any trust or power over or "concerning lands, or in any manner relating thereto, "shall hereafter be created, etc., unless by act or opera- "tion of law, or by deed or conveyance in writing, sub- "scribed by the parties creating, granting, assigning, sur- "rendering or declaring the same, or by his lawful agent "thereunto authorized by writing. This section pre- "cludes the idea that when the defendant secured the "contract for the purchase, and the equitable title to the "land thereunder, any trust attached thereto in favor of "the plaintiff. This view is fully sustained by *Smith* v. "*Burnham*, 3 Sumner, 345, where the authorities are "elaborately reviewed by Judge Story. * * * It is "unnecessary to consider this question, *as there was no* "*partnership between the parties.* The agreement was "for the *purchase only*, the title to be taken in common. "It is clear that such an agreement does not constitute a "partnership. (*Sage* v. *Sherman*, 2 Comstock, 418.)"

2. It may be suggested by opposing counsel that the defense of the Statute of Frauds, not having been specially set up in the answer, is not available, but the law, as has been more than once held by this court, is otherwise, where the answer, as in this case, expressly and categorically denies the making of the alleged agreement upon which the bill is founded.

In *May* v. *Rice, Assignee of Sloan, supra*, this court, referring to the agreement there in question, said:

"If the case depended upon the parol agreement set up "by the complainant, whereby he claims that Asa May "bound himself to convey the land to him, no relief could "be granted on this bill. The Statute of Frauds would "be a complete bar. The defendant, in his answer de- "nies that any such agreement was made. Such a de-

"nial is as effective for letting in the defense as if the "Statute of Frauds had been pleaded. (Sugden, Vendors "and Purchasers, 150, chap. 4, Sec. 6, par. 5.")

To the same effect is *Dunphy* v. *Ryan*, *supra*, where *May* v. *Sloan* was, with other cases, cited and followed, and the court said:

"The denial in the replication of the plaintiff of the "making of the contract on which the defendant based "his cross-action is as effective for letting in the defense "of the Statute of Frauds as if the statute had been spe- "cifically pleaded."

The case of *Levy* v. *Brush*, which has been recognized and approved as late as *Peck* v. *Peck*, 110 N. Y., 64, seems particularly in point as an authority in this case, inasmuch as the sections of the New York statute that were considered are exactly the same as those of the Minnesota statute above quoted.

To the same effect are:

Henderson v. *Hudson*, 7 Munford (Va.) 510.
Walker v. *Herring*, 21 Gratton, 678.
Bird v. *Morrison*, 12 Wis., 138.

All the Minnesota cases touching the question, at least all that the writer by diligent search has been able to discover, were cases where either the land was purchased by an already existing business partnership, or where a partnership was formed for "dealing" in lands; that is, for buying and selling lands and dividing the profit. The land, in other words, either by virtue of the already existing contract of partnership, or for the reason that the agreement for its purchase included an agreement *to sell* and divide the profits, was divested of its character as

realty, and became merely an article of trade. Leading examples of such Minnesota cases are:

Arnold v. *Wainwright*, 6 Minn., 358.
Hodge v. *Twitchell*, 33 *id.*, 389.
Stern v. *Harris*, 40 *id.*, 209.
Newell v. *Cochran*, 41 *id.*, 374.

Whether those decisions that hold such agreements to be without the purview of the statute of frauds, are founded upon a sound principle, is a question not here involved. It is sufficient for the purposes of this argument that even those cases, that make such agreements an exception to the usual operation of the statute requiring a writing where the contract concerns or relates to lands, recognize the fact that they *are an exception*, and concede that where the agreement looks not to the sale of the land as a thing of trade, but to the acquisition of an interest in the land itself, as such, it must be in writing.

The case before the court is of the latter class. According to the agreement alleged and attempted to be proved, the parties were to become purchasers of the railroad lines and lands not for the purpose of dealing in them as an object of trade, that is, of selling them and dividing the profits, but for the purpose of owning, managing and operating them. That appellant asks for such portion of the stock and bonds of the purchasing company as *stands for and represents* his alleged interest in the properties themselves in nowise alters the nature of the alleged agreement upon which he seeks relief. The agreement, if ever made, was, in its inception, an agreement for an interest in the railroad lines and lands, and was, therefore, void under the 12th section of the statute. Such being the case, appellant cannot obtain the relief

prayed; for only through the medium of a trust already existing in his favor in the railroad lines and lands at the time the stock and bonds were issued, or by virtue of a trust subsequently declared or acknowledged to exist in the stock and bonds, could appellant lay claim to such portion of the stock and bonds as stands for and represents his alleged interest int he properties themselves. The capital stock is symbolically *the property itself*, and the bonds are a charge upon the property, in which he would have no interest unless he owned an interest in the property when it was mortgaged to secure the bonds. That no such trust in appellant's favor existed in the railroad lines and lands when the stock and bonds were issued, or was subsequently declared or acknowledged to exist in the stock and bonds, will be shown below.

It thus seems to be apparent that the agreement, as alleged, was in no sense a partnership agreement, or an agreement to deal in or buy and sell lands, but merely an agreement by which the parties were to acquire and own, operate and manage the properties. Such being the inherent nature of the agreement, as alleged, appellant's case could not have been helped by an allegation (if one had been made) that the lands were to be acquired as in partnership. The agreement could not have been arbitrarily labeled a partnership agreement, but would be classified and treated by the court, according to its terms, as alleged. But so far from alleging that the lands were to be acquired as in partnership, the bill shows clearly that the pleader had in mind no such theory or conception of the alleged contract. Toward the end of subdivision 5 of the bill it is alleged:

"That over 500 miles of railroad in said State of Min-
"nesota, and the equipment appertaining thereto, and

"over one million acres of land in said state, and much "other valuable property, and in all worth over $15,000,- "000, was thereby acquired and became vested in said "defendant railway company for the use and benefit of "your orator and the said Kittson, Hill, Smith and Ste- "vens, *in proportion to their several and respective interest* "in said bonds so purchased, as aforesaid, subject only to "the advances made and the obligations incurred in con- "nection with said enterprise."

Now it is obvious that if appellant had a *several* interest in the bonds used to purchase the railroads and lands, any interest he might thereby have acquired in the latter would be several, and not that of a partner. Partners do not have "several and respective interests" in the *corpus* of the partnership property; neither do they have the interest of tenants in common, for the latter have undivided interests in the property owned by them; the title of each tenant in common attaching to every particle of the *corpus* of the property.

As will be seen by further reference to the bill under the point next to be discussed, the bill seems to be drawn upon the theory that appellant paid a part of the consideration for the properties, and that the appellee railway company, paying no consideration other than that furnished by appellant and the four associates, took and holds the property affected with a trust in appellant's favor to the extent of the consideration furnished by him.

II.

NO TRUST EXISTS IN APPELLANT'S FAVOR IN THE RAILROAD PROPERTIES PURCHASED AND ACQUIRED BY THE APPELLEE RAILWAY COMPANY, AND NONE EXISTS IN THE STOCK AND BONDS THAT STAND FOR AND REPRESENT THOSE PROPERTIES.

In their brief in the lower court, appellant's counsel give their view of the nature of the bill in the following language:

"This bill is filed, not to enforce the original agree-
"ment, not to compel Kittson and Hill to go on and pur-
"chase the bonds, or to raise the necessary funds for
"that purpose, or to use the bonds in paying for the rail-
"roads; nor is it brought to compel the bondholders to
"perform their agreement to sell the bonds on the terms
"stipulated. All this has been accomplished and per-
"formed, and this bill is filed, after the original contract
"has been fully completed, for an accounting, *the en-*
"*forcement of a trust*, to compel the turning over to com-
"plainant his share of the profits now in the possession of
"the defendants."

So far as this definition is susceptible of analysis, it seems to mean that the bill is one simply for the enforcement of a trust. The remedy of an accounting is one that is incident to the enforcement of rights growing out of contract or trust relations, and is allowed, not as primary relief, but only because the full enforcement of those rights is impossible without an accounting. Moreover, "to compel the turning over to complainant his "share of the profits," etc., would only be done by way of enforcement of the alleged trust. The definition of

counsel therefore seems the same as if they had styled the bill simply as one to enforce a trust. In that aspect, it is now to be treated.

1. It is not alleged, nor is it attempted to be proved, that the deeds of conveyance to the appellee railway company contain any declaration of a trust in appellant's favor. Nor is it claimed that the deeds were accompanied with even an oral declaration of trust by the grantor in appellant's favor. On the contrary, his interest, as he himself says, was to be kept secret. Nor is it alleged or claimed that the appellee company, either simultaneously with receiving or after receiving title to the properties, declared or admitted any trust in the properties in favor of appellant. As to any express trust in the railroad properties themselves, it is sufficient, however, to say that there was no writing, and that therefore whatever oral declarations or admissions might have been made, no express trust could have been thereby created in the properties themselves.

As to the stock and bonds of the appellee company, there was not any express trust because neither at the time they were issued and received by Messrs. Kittson and Hill, or after they were so issued and received, or at any other time was a trust declared or acknowledged. And there is neither allegation nor proof of such a declaration or acknowledgment of trust in the *stock and bonds*.

2. No constructive trust arose or exists in appellant's favor in the stock and bonds that he seeks to recover, as representing his alleged interest in the railroad properties and lands, because no fraud is proved or even alleged.

The taking of title by the appellee railway company is not alleged to have been in violation of the alleged agree-

ment, but in harmony with it. In subdivision 3 of the amended bill, (Rec. 6-7,) it is alleged that there was to be, under the alleged understanding, a new issue of bonds "of the newly-to-be organized company; that it was the "understanding on the part of all said parties that, as "soon as said lines of railroad and mortgaged property "should be acquired by them under said decretal sales, a "new issue of bonds should be made by them, or by the "company to be organized by them to take hold, man-"age, and operate said property," etc. Thus showing that, under the alleged agreement set up by appellant, it was expected that a new company would be organized for the purpose of acquiring, taking, holding and operating said property.

In subdivision 4 of the bill, appellant alleges that the appellee railway company "is a corporation organized "in May, 1879, under the laws of the State of Minneso-"ta, by the said Smith, Stevens, Kittson and Hill, for the "purpose of acquiring, taking, holding, operating and "managing said lines of railroad and other mortgaged "property, for the use and benefit of the said parties, "(including appellant), interested in the purchase of said "bonds as aforesaid, when said lines of railroad and other "mortgage property should be acquired by or for them, "or offered for sale under said foreclosure decrees."

In the next following subdivision of the bill it is alleged that the appellee company did in fact "bid in, purchase "and acquire all the lines of railroad and mortgaged "property for the use and benefit of the aforesaid parties "in interest in the purchase of said bonds as aforesaid," including appellant; "that all the bonds which had been "purchased as aforesaid were turned in and used in the "payment of said lines and property by the said Kittson,

"Hill, Smith and Stevens," in whose name, as alleged in subdivision 3 of the bill, the bonds of the old company were purchased and held agreeably and pursuant to the alleged agreement; and that the railway company took the property without consideration, except the consideration furnished and provided by appellant and the four associates. That the appellee railway company thereby acquired and became vested with the property for the use and benefit of appellant and the four associates "in proportion to their several and respective interest," etc., and that the appellee company, at the time of such purchase of the lines of railroad and other mortgaged property, knew of the interest of appellant.

Nowhere in the bill or in the proofs is it alleged or claimed that the taking of title and the holding, managing and operating of the property by the appellee company was a violation of the alleged agreement and in fraud of appellant's alleged rights.

In his testimony Mr. Farley says (Rec., 73): "There "was a good deal said, *by myself principally*, in the pres- "ence of Mr. Hill and Mr. Kittson about the reorgani- "zation of this property when it was sold under fore- "closure proceedings. That a *new company would be* "*organized*, and a sufficient number of bonds issued, "mortgages placed upon the property and bonds issued "which would sell at par, and, according to our calcu- "lations be worth from four to five millions of dollars. "With a mortgage on all this property behind it it would "make the bonds very good and would sell at par, and "that our profits would consist of owning all the stock."

Then, as before stated, Mr. Farley himself says in his testimony that his interest in the purchase of the properties was to be kept secret; that it was "sacredly agreed"

that that was the best plan to pursue. So that if appellant's alleged interest was to be kept secret, it is manifest that, in order to insure such secrecy, the title to the property must necessarily have been taken in the names either of the four associates or of the company organized by them; and that such taking of title could not, therefore, have been in fraud of appellant's alleged rights.

It is said above that no fraud is even alleged, and that statement is true, notwithstanding the general charge of collusion and conspiracy between the appellees to wrong and defraud appellant by refusing to deliver or turn over to him any of the capital stock of said company, and to account for the results of the enterprise, etc. This is not a charge of fraud in any legal sense.

As was said in *Levy* v. *Brush*, *supra*: "No case can "be found where a contract has been taken out of the "statute in favor of a party who had no existing interest "in the property; who had done no act of part performance; who had parted with nothing under the contract; "simply upon the ground that the other party was guilty "of fraud in refusing to perform his verbal agreement. "That is all there is of this case except the offer of performance by the plaintiff. To hold that to be sufficient "to take the case out of the statute would repeal it. "Care must be taken that this is not done under an idea "that, as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral "sense, a party is attempting to perpetrate a fraud. A "party, in no legal sense, commits a fraud by refusing to "perform a contract void by its provisions. He has not "in that sense, made a contract, and has a perfect right, "both at law and in equity, to refuse performance."

As said by Mr. Justice STRONG, in *Kellum* v. *Smith*,

33 Pa. St., 158, where it was sought to enforce a promise to purchase real estate at an execution sale and convey it to the defendant in the execution, when he should repay to the purchasers their advances:

"But the fraud which will convert the purchaser at a "sheriff's sale into a trustee, *ex maleficio*, of the debtor, "must have been fraud *at the time of the sale*. Subse- "quent crime will not answer any more than subsequent "payment of the purchase money will convert an abso- "lute purchase into a naked trust. Where the purchaser "at a sheriff's sale promises to hold for the debtor and "afterwards refuses to comply with his engagement, the "fraud, if any, is not at the sale, not in the promise, but "in its subsequent breach. That is too late. It is abun- "dantly settled that equity will not decree such a "purchaser to be a trustee, unless there is something "more in the transaction than the mere violation of a "parol agreement."

In this case, as in the one just cited, the "fraud" which is alleged, is not fraud at the time of the sale of the rail- roads and lands to the appellee company, but fraud after the sale in not turning over to appellant such part of the stocks and bonds of the appellee company as stands for and represents his alleged interest in the properties.

"If the refusal to comply with a parol agreement con- "stitutes such a fraud as to take a case out of the statute, "then no case is within it. For a party has only to allege "that a person contracting by parol fraudulently refuses "to comply with the terms of his parol agreement, which "he must do in every case, or there would be no neces- "sity for resorting to a court of equity to enforce it, and "a case is made to which the statute does not apply."

Perry v. *McHenry*, 13 Ill., 136.

In *Dunphy* v. *Ryan supra*, this court said:

"But the mere breach of a verbal promise for the pur-
"chase of land will not justify the interference of a court
"of equity. There is no fraud in such a refusal. The
"party who so refuses stands upon the law and has a right
"to refuse. Under the circumstances of this case, the
"statute is as binding on a court of equity as on a court of
"law. If the mere refusal of a party to perform a parol
"contract for the sale of land can be construed to be such
"fraud as would give a court of equity jurisdiction to en-
"force it, the statute of frauds would be rendered vain and
"nugatory. The defendant knew, or ought to have
"known, that the statute requires such a contract, as the
"one he seeks to enforce, to be evidenced by writing.
"That he did not exact a contract in writing is his own
"fault. Courts of equity are not established to relieve
"parties from the consequences of their own negligence or
"folly. The statute of frauds is founded in wisdom, and
"has been justified by long experience. As was said by
"Mr. Justic GRIER in *Purcell* v. *Miner*, *supra*, the statute
"is absolutely necessary to preserve the title to real prop-
"erty from the chances, the uncertainty and the fraud at-
"tending the admission of parol testimony. It should be
"enforced."

3. The appellee company did not receive the railroad properties and lands affected with a resulting trust in appellant's favor.

The bill is evidently drawn upon the theory that a trust resulted in appellant's favor by reason of his paying a part of the consideration when the properties were bid in, purchased and acquired by the appellee company. It is alleged "that the properties were all bid in, purchased or
"acquired by the appellee company for the use and ben-
"efit of the aforesaid parties in interest in the purchase

" of said bonds as aforesaid, including your orator, by the " direction and procurement of the said Kittson, Hill, " Smith and Stevens, and that all of said bonds which " had been purchased as aforesaid, were turned in and " used in payment of said lines of railroad and property " by the said Kittson, Hill, Smith and Stevens; and that " the said railway company paid nothing in the purchase " of said railroads and property, but took the same with- " out consideration, except *the consideration fur ished* " *and provided by your orator* and said Kittson, Hill, Smith " and Stevens, and which consideration, so furnished and " provided, aside from said bonds as aforesaid, was " furnished by the said Smith and Stevens pursuant to " the aforesaid arrangement with them for joining in said " enterprise. That over 500 miles of railroad in the State " of Minnesota, with the equipment appertaining thereto, " and over one million acres of land in said state, and " much other valuable property, in all worth fifteen mill- " ions of dollars, were thereby acquired and became " vested in said defendant railway company for the use " and benefit of your orator, and the said Kittson, Hill, " Smith and Stevens, in proportion to their several and " respective interest in said bonds so purchased as afore- " said, subject only to the advances made and obligations " incurred in connection with said enterprise; and that at " the time of the said purchase of said lines of railroad " and other mortgaged property, and at the time of the " use of said bonds as aforesaid in payment therefor, and " at the time said property was invested in said defendant " railway company, the said Smith and Stevens and the " said railway company had notice and knowledge that " your orator was jointly and equally interested in said " bonds so purchased as aforesaid, and in said undertak- " ing and enterprise with the said Kittson and Hill."

The theory of these allegations seems to be that appellant had become and was an owner of a part of the bonds when they were used in paying for the property, and that that fact being known to the appellee company, a trust resulted in appellant's favor, to the extent of the consideration furnished by him.

The most obvious objection to this theory is that the alleged agreement is not severable into two agreements, independent and separately enforceable—the one to buy the bonds of the old companies and the other to buy the properties at foreclosure. The two features of the alleged agreement were inter-dependent. The bonds when purchased were, according to the terms of the alleged agreement, dedicated to the purchase of the properties at forclosure, and the purchase of the properties was only to be made through means of the bonds. According to the allegations of the bill, the parties did not agree to make either purchase independently of the other. It follows, therefore, that the alleged agreement, being within the Statute of Frauds, in so far as it concerned or related to a purchase of, or the creation of a trust in, lands, was *entirely void* in its inception, and therefore conferred no rights upon appellant respecting the bonds purchased by and in the name of the four associates.

"It is clear that if the several stipulations are so inter-
"dependent that the parties cannot reasonably be con-
"sidered to have contracted, but with a view to the per-
"formance of the whole, or that a distinct engagement
"as to any one stipulation cannot be fairly or reasonably
"extracted from the transaction, no recovery can be had
"upon it, however clear of the statute of frauds it may
"be, or whatever be the form of action employed.
"The engagement in such case is entire and indivisible."

Browne on Statute of Frauds, Secs. 140-142 and cited cases.
Rainbolt v. *East*, 56 Ind., 538.

Let it be assumed, however, that the alleged agreement was divisible, and that appellant had *some* interest in the bonds at the time they were used in the purchase of the railroads and lands. Did he have such an interest as that, upon the bonds being used in the purchase of the properties, a trust resulted in his favor?

And, first, it may be premised that to raise a resulting trust in appellant's favor it was necessary that either the *whole or a definite part* of the consideration for the purchase of the properties should have been paid by him.

"A trust will not result to one who pays a part only of "the consideration of the purchase of land conveyed to "another unless it be some definite part of the whole "consideration, as one-third, one-half or the like."

Sayer v. *Townsend*, 15 Wend., 650.
Olcott v. *Bynum*, 17 Wall, 44.
Reed v. *Reed*, 135 Ill., 482.
Perry v. *McHenry*, 13 Ill., 234.
Alexandea v. *James*, 13 Ill., 221.
Crap v. *Norton*, 2 Atk., 74.
White v. *Carpenter*, 2 Paige, 239.
Smith v. *Burnham*, 3 Sumner, 462.

"And the part of the consideration paid by the person "claiming a resulting trust must have been paid for "some aliquot part of the property, as a fourth, a third or "a moiety. * * * Such a trust must arise, if at all, "at the time the purchase is made. The funds must "then be advanced and invested. It cannot be created

" by after advances or funds subsequently furnished. It " does not arise upon subsequent payment under a con- " tract by another to purchase."

Olcott v. *Bynum. supra.*
Reed v. *Reed, supra.*

If, then, Mr. Farley had an interest in the bonds used in the purchase what was that interest? Was it a definite part? And was it paid for an aliquot part of the properties?

He does not allege that he owned any definite part of those bonds; on the contrary, by conceding as he does that the exact amount of his alleged interest in the railroad properties that the appellee company acquired could only be determined after all the expenses connected with the enterprise should have been deducted, he concedes that his interest, if he had any, in the bonds used in the purchase was ascertainable only after deducting such expenses. But some of the expenses of the enterprise must necessarily have been incurred after the bonds were purchased and so used. Whence it follows that at the time of the purchase he did not own any definite part of the bonds.

But what Mr. Farley really claims an interest in, is the enterprise of buying the railroad lines and lands, and not the purchase of the bonds. His bill alleges that his interest in the properties was "subject to the advances " made and obligations incurred in connection with said enterprise " * * * and that the appellee company's bonds " and the proceeds thereof were used so far as was " necessary to pay the cost of said bonds of the old com- " panies so purchased as aforesaid, and all *other* expenses " incurred or incident to said enterprise." Now, if Mr.

Farley was a part owner of the old companies' bonds purchased by the associates why should the latter be reimbursed for the cost of the old bonds? Why should they be paid for what already belonged to Mr. Farley?

Suppose it were alleged that the parties had agreed to buy the railroad properties and lands for cash, and that no part of such cash should be furnished by Mr. Farley, but all of it by the others. In the absence of a written agreement, declaring Mr. Farley's interest, could he have claimed a resulting trust in his favor? Manifestly not, for in the case supposed, none of the consideration would have been paid by him. Now, instead of buying the property for cash, those that furnished the money bought the bulk of the outstanding bonds secured upon the properties, and turned those bonds in *for cash* to the extent of the dividend that they were entitled to upon the sale of the property. The purchase of the bonds being a mere step in the enterprise of buying the properties, and Mr. Farley's alleged interest being in the enterprise and not in the bonds, he certainly acquired, under the alleged agreement, no interest whatever in the bonds, and having no interest in the bonds used in the purchase of the properties and not having paid any cash, he can claim no resulting trust in the properties upon the ground that he furnished a part of the consideration.

Does he claim a resulting trust by reason of his alleged services in giving advice, aid and co-operation in carrying ont the enterprise? If so, what part of the consideration did those services form? Certainly no aliquot part of the consideration, nor were they performed *at the time of the purchase* of the railroad properties, but are alleged to have been performed prior to and in aid of the purchase of the bonds.

But "a resulting trust 'is founded on the actual pay-"ment of money, and on no other ground;' and that "'the trust results from the original transaction, at the "time it takes place, and at no other time.'"

Botsford v. *Burr*, 2 Johns Ch., 405.
Olcott v. *Bynum*, *supra*.

In *Perry* v. *McHenry*, *supra*, where the complainant claimed a resulting trust in his favor by reason of having assisted the defendant to make the purchase the court said: "The defendant purchased a tract of land of the "Irwins, and paid his own money for the same; the "complainant was present at the time of the purchase, "*assisted the defendant to make it, and if you please,* "*was the means of his procuring it at a less price than* "*he otherwise could have done*, though of the latter fact "there is no evidence; yet admitting its truth even then "the complainant could not maintain the suit."

In no event, therefore, can his alleged services have been sufficient to raise a resulting trust. At most, he would be entitled to recover for his service upon a *quantum meruit*.

"It is well settled that when one person pays money "or *performs services* for another upon a contract void "under the statute of frauds, he may recover the money "upon a count for money paid to the use of defendant at "his request, or recover for the services upon a *quantum* "*meruit*."

Dunphy v. *Ryan supra*, and citations.

B. But, even if Mr. Farley did furnish an aliquot part of the consideration, and at the time of the purchase of the properties, the statutes of Minnesota dispose completely of any claim that a resulting trust arose in

appellant's favor. Sec. 7, chap. 43, already cited, provides that "when a grant for a valuable consideration is "made to one person, and the consideration therefor is "paid by another, no use or trust shall result in favor of the "person by whom such payment is made, but the title "shall vest in the person named as alienee in such con-"veyance," except in favor of creditors of the person furnishing the consideration.

This statute is almost an exact copy of the New York statute on the same subject, and the Minnesota decisions upon it have followed the decision of the New York court of Appeals in *Garfield* v. *Hatmaker*, 15 N. Y., 475. That was an ejectment suit. Plaintiff proved and the judge found, as facts in the case, a judgment against Anthony Hatmaker, one of the defendants, and execution thereon, a sale of the premises described in the complaint and the deed of the sheriff to plaintiff. He also found that Anthony Hatmaker made a contract for the purchase of a part with one Peter Protts, and that Protts conveyed the same to Susan Hatmaker, the wife of the defendant Anthony; that the remaining portion of the premises was conveyed to Susan Hatmaker by one Laughlin, and that the purchase money of each of the lots was paid by Anthony Hatmaker, or out of moneys belonging to him. Both the conveyances to Mrs. Hatmaker were made in 1851. The lower court held that the conveyance to Susan Hatmaker created a trust in favor of the creditors of her husband; that the sale under the execution and sheriff's deed vested the title in fee in the plaintiff, and that the plaintiff was entitled to judgment.

The court (Judge COMSTOCK) said:

"The rule at common law was, that if lands were con-"veyed to one person, the consideration for which was

" wholly paid by another, a trust resulted in favor of the " person who paid the price. Such a trust, being raised " by implication of law, was held not to be within the " statute of frauds, and it was also held that under the " former statute of uses the interest of the *cestui que* " *trust* could be seized and sold as a legal estate on exe- " cution against him. In the present case, the plaintiff's " title depends on the same rules, if they still exist, and " the question has been determined in his favor by the " court below, in accordance with the decision of the for- " mer Supreme court, in *Wait* v. *Day* (4 Denio, 439), " but opposed to the views of the late court of Chancery, " as stated in *Brewster* v. *Power*.

" Our present statute of ' uses and trusts ' has made " several very important changes in the law, and among " them, I think, it has subverted the rules and principles " which have just been stated. Under the old law, the " person who paid the consideration money had an estate " in the land, by way of resulting trust, and the grantee " in the conveyance, who had paid nothing, had no inter- " est. I mean, of course, no actual interest, without " inquiring whether he held the formal legal title. Such " was the relation between the grantee and the person " who paid the purchase money; and the right to sell the " land on judgment and execution against the latter, was " the result of that relation. This was true, even when " the transaction was intended to defraud creditors. In " such cases the creditor could take the land in execu- " tion through the resulting trust, although, perhaps, " neither courts of law nor equity would aid the *cestui* " *que trust* for his own sake. His own inability to arrest " a fraudulent trust did not affect the principle. The " creditor, where the whole equitable interest was in his

" debtor, took the land, not through or by means of the " fraud, but irrespective of it, and through the trust " which the law implied.

" Now this relation between the grantee and the per- " son paying the purchase money appears to me to be " entirely overthrown by the present statute of uses " and trusts. It is declared that 'when a grant for a " valuable consideration shall be made to one person, and " the consideration therefor shall be paid by another, *no* " *use or trust shall result* in favor of the person by whom " such payment shall be made, but the title shall vest in " the person named as the alienee in such conveyance, " subject only to the provisions of the next section.' The " next section (Sec. 52), declared that 'every such con- " veyance shall be deemed fraudulent as against the credi- " tors at the time of the person paying the consideration; " and where a fraudulent intent is not disproved a trust " shall result *in favor of such creditors* to the extent that " may be necessary to satisfy their just demands.'

" Now, it appears to me that this language is free " from all ambiguity. The resulting trust of the com- " mon law is abrogated in the most explicit terms. The " person paying the consideration money must take the con- " veyance to himself, or he can have no legal or equitable " interest in the land. The very foundation, therefore, of " the right, which the creditor had to take the land in " execution, fails; but in place of that right, and of the " common law principles on which it depended, the statute " has declared a presumption of fraud, and, through the " fraud, a resulting trust, not in favor of the debtor, but " of the creditor only. There is no interest, legal or " equitable, in the debtor, and therefore nothing to which " a judgment and execution can attach; but instead of

" this there is a pure trust in favor of the creditor, which " the statute impresses upon the legal estate in the hands " of the grantee in the conveyance, and which can be en- " forced in equity only.

The Minnesota cases place the same construction upon their statute, which is identical, as stated, with the New York statute.

In *Wentworth* v. *Wentworth*, 2 Minn., 238, the plaintiff had settled upon the land in question then belonging to the United States; had improved and cultivated it and continued to reside thereon up to the time of the commencement of the action. The defendant, his brother, had offered to advance and loan him a sum of money sufficient to enter the land at the land office, the plaintiff to pay it back at any time within a year thereafter, and such offer was accepted; it was agreed that the defendant should enter or purchase the land for the plaintiff, but that defendant might enter it in his own name, to secure the repayment of the loan. The purchase and entry were so made, and the plaintiff, relying on the good faith and integrity of his brother, did not receive or demand from him any bond or other instrument containing such agreement. The defendant having refused to convey upon tender by the plaintiff of the amount of the purchase money within a year, the latter filed his bill for specific performance. All the facts, as stated, appeared on the face of the bill, and hence were reached by demurrer. The court said:

" I do not see how it can materially affect the question " whether the plaintiff borrowed the money from the de- " fendant and paid the price of the land with it, or whether " the defendant paid the price with his own money, be- " cause, in the first case, no trust could have arisen from

"the fact in favor of the plaintiff, under our statutes, because "sections 7 and 8, Chap. 44, pages 202–3, Revised Stat- "utes, expressly declare that no such trust shall result; "and in the latter case, if the defendant paid for the land "with his own money, then his agreement, that he pur- "chased for the plaintiff, could create no trust, because "express trusts concerning lands can only be created for "such purposes, and by deed or conveyance in writing, "subscribed by the party, etc. (Rev. Stat., 203, Sec. "11; also *ib.*, 267, Sec. 6.) So, in neither view, can I "see how the arrangement can be held to create or result "in a trust in favor of the plaintiff. It is simply a parol "agreement to convey the land to the plaintiff when he "should pay the defendant the purchase price which he "had paid out for it. This contract is clearly within the "Statute of Frauds, standing alone, and cannot be en- "forced until it has been partly performed."

Sumner v. *Sawtelle*, 8 Minn., 872.
Durfee v. *Pavett*, 14 *id.*, 424.
Johnson v. *Johnson* 16 *id.*, 462.
Jordan v. *White*, 20 *id.*, 77.
Connelly v. *Sheridan*, 41 *id.*, 18.
Petzhold v. *Petzhold* (Minn.), 44 N. W., 933.

III.

NO RELIEF CAN BE HAD BY WAY OF SPECIFIC PERFORMANCE OF THE ALLEGED AGREEMENT.

Since the alleged agreement in its essence is an agreement concerning lands, or relating thereto, it comes, as has been shown, strictly within the scope of the 10th section of the Minnesota Statute of Frauds; and not being

in writing and there having existed no trust in the railroad lines and lands in favor of appellant, through the medium of which he could acquire an interest in the capital stock that represents the properties and in the bonds secured upon the properties, it follows that the alleged agreement can not be made the basis of any relief unless by way of specific performance. The only opening left for appellant by the statute of frauds and the statute abrogating resulting trusts is found in the 13th section of the statute of frauds, which provides as follows:

"Nothing in this chapter contained shall be construed "to abridge the power of courts of equity to compel the "specific performance of agreements in cases of part "performance of such agreements."

As viewed by Judge Treat, when the cause was heard before him, on the bill, joint plea and evidence in support thereof, it was "brought to compel them (Messrs. Kitt-"son and Hill) and the railroad defendant, *as if by specific* "*performance*, to issue to him, Farley, his proportionate "share of its capital stock, and also grant him propor-"tionate parts of profits and gains, and also interests in "undivided property yet remaining."

The next inquiry, therefore, must be whether anything was done by appellant, prior to commencing the suit, that would constitute such part performance by him as would remove the agreement from the operation of the statute of frauds, and afford an opportunity for a decree of specific performance if the agreement, as alleged, and attempted to be proved, is such that a court of equity under recognized principles would or could decree specific performance.

1. The bill alleges "that throughout said negotiations "for the purchase of said bonds, and in the purchase

" thereof, your orator was continuously called upon by " the said Kittson and Hill for facts and information, ad- " vice and co-operation in respect thereto, and at their re- " quest furnished and rendered the same pursuant to the " aforesaid agreement and understandings between them, " and that said negotiations were only successful through " and by means of the advice and co-operation of your " orator and the facts and information peculiarly within " his knowledge as aforesaid and imparted by him to the " said Kittson and Hill, at their request, under said un- " derstandings and agreements between them as afore- " said."

This is all that the appellant claims to have done and it is all that he claims the alleged agreement contemplated he should do.

Appellees' chief counsel has not only demonstrated that appellant did not at any time have any information that Messrs. Kittson and Hill and their associates did not possess with regard to the value of the roads, the whereabouts and the ownership of the bonds, the prices at which some of them had been sold, or the prices at which the Dutch committee were willing to dispose of their holdings, but he has also shown that the enterprise of acquiring the railroad property was conceived by Mr. Donald A. Smith, and was a matter of discussion and joint effort on the part of Messrs. Smith, Kittson and Hill long before appellant became connected in any way with the First Division Company or knew anything of its properties, and that they had ascertained from the records of court proceedings all the facts with regard to the ownership, control, amount and value of the bonds and the condition of the properties before Mr. Farley became general manager under the First Division Com-

pany of its lines; whereas Mr. Farley himself testified that he knew nothing whatever as to the affairs of that company and its bond issues until some time after he became such general manager. The writer does not mean to attempt to add to the discussion of the chief counsel upon that point.

It may be assumed here however that Mr. Farley did do what he alleges in his bill as above quoted.

These acts may be regarded as either:

1. The consideration furnished by Mr. Farley; or,
2. As part performance of the contract.

If regarded as the consideration, the usual rule applies that payment of consideration does not constitute part performance that will move the court to decree specific performance, but plaintiff's remedy is on a *quantum meruit*.

Dunphy v. *Ryan, supra.*

If regarded as part performance, then it must be alleged and proved that the acts of plaintiff are referable *only* to the contract, and not to his duty to the bondholders and their agents, Kennedy & Co. The allegation must be made and proved; it may not be left to the court for inference.

The question is, Did the furnishing of such advice, information and co-operation constitute a part performance in such sense as to take the alleged agreement out of the statute of frauds?

What acts are acts of part performance? "In order to "make the acts such as a court of equity will deem part "performance of an agreement within the statute, it is "essential that they should clearly appear to be done "solely with a view to the agreement being performed;

" for if they are acts that might have been done with
" other views, they will not take the case out of the
" statute, since they cannot properly be said to be done
" by way of part performance of the agreement."

2 Story Eq. Jur., Sec. 762, and citations.

Chancellor KENT said:

" It is well settled that, if a party sets up part perform-
" ance to take a parol agreement out of the statute (of
" frauds) he must show acts unequivocally referring to
" and resulting from that agreement, *such as the party*
" *would not have done unless on account* of that very
" agreement, and with a direct view to its performance."

Phillips v. *Thompson*, 1 Johns. Ch., 149.

" It is in general of the essence of such an act (of part
" performance) that the court *shall, by reason of the act*
" *itself, without knowing whether there was an agreement*
" *or not, find the parties unequivocally in a position differ-*
" *ent from that which, according to their legal rights, they*
" *would be in if there were no contract.* Of this a common
" example is the delivery of possession. One man, without
" being amenable to the charge of trespass, is found in
" possession of another man's land. Such a state of
" things is considered as showing unequivocally that some
" contract has taken place between litigant parties. And
" it has, therefore, on that specific ground, been admitted
" to be an act of part performance. (*Morphett* v. *Jones*,
" 1 Swanst., 172.) But an act which, though, in truth,
" done in pursuance of a contract, *admits of explanation*
" *without supposing a contract*, is not, in general, admit-
" ted to constitute an act of part performance, taking the
" case out of the statute of frauds, as for example, the

"payment of a sum of money alleged to be purchase "money."

Dale v. *Hamilton*, *supra*.

These principles are recognized and applied in *Wentworth* v. *Wentworth*, *supra*. The complainant having settled on government lands which were afterwards purchased and entered for him by his brother under an oral agreement by the latter to convey to him upon being repaid the purchase money alleged and proved that he "continued to improve and cultivated the "same, and has resided thereon with his family up to "the present time," that is, including the time since he first settled upon the land until the commencemencement of the action; or in other words, the plaintiff remained upon the land after the agreement up to the time of the commencement of the suit in the same manner in which he had previously been upon it. After quoting the first two of the passages last herein above quoted, the court said: "Under these rules, it is hard to "see how the mere continuance in the possession of land "can be attributed to the making of the contract and as in "performance of it; and it is quite easy to see that it was "the result of the original entry and possession. The "silence of the complaint as to the purpose with which the "possession was continued, seems to destroy all reason "for supposing that it was done in performance of the "agreement."

Lang v. *McLaughlin*, 14 Minn., 72.
Pfiffner v. *Stillwater*, *etc.*, *R. R. Co.*, 23 id., 343.
Traphagen v. *Burt*, 68 N. Y., 35.

Tested by these criteria did the furnishing of advice,

information and co-operation constitute such part performance as to avoid the effect of the statute of frauds.

Was such information, advice and co-operation, something of value, not having furnished which, Mr. Farley would have been the richer, and having furnished which, he is the poorer. The acts alleged must be such that the performance of them puts the plaintiff in such a position that it would be inequitable for the court not to decree specific performance. This cannot be said of mere services, for which an action will lie on a *quantum meruit*.

Is Mr. Farley in a worse position, by reason of having given such information, advice and co-operation than if he had not given it? It makes no difference that such information, advice and co-operation may have been of value to Messrs. Kittson and Hill. If Mr. Farley gave his associates in the enterprise something that was of value to them, but not of value to him, he has only a right of action against them upon a *quantum meruit*, for the value of his services. They may be in a better position by reason of his information, advice and co-operation, but he is in no worse position by reason of having given such aid, or if he is in a worse position, his giving such information, etc., no more constitutes a part performance in the legal sense of that term than would the payment of money by him, if the alleged contract had required him to furnish money.

In *Dunphy* v. *Ryan*, *supra*, the court said: "It is "well settled that when one person pays money or per- "forms services for another upon a contract void under "the statute of frauds, he may recover the money upon a "count for money paid to the use of defendant at *his* re- "quest, or recover for the services upon *quantum meruit* "[citing authorities.] But in such cases the suit should "be brought upon the implied promise."

Again, was the giving of such information, advice and cooperation solely and "unequivocally" referable to the alleged agreement, and was it such as he would not have given, "unless on account of that very agreement "and with a direct view to its performance;" and was the giving of such aid "such an act that the court shall "*by reason of the act itself*, without inquiring whether "there was an agreement or not, find the parties *unequiv-* "*ocally in a position different from that which according* "their legal rights they would be in if there was no con- "tract?"

It is nowhere alleged in the bill that such information, advice and cooperation would not have been given except in pursuance of the alleged agreement. On the contrary, it appears that Mr. Farley was receiver of one road, and general manager under the trustees in possession of the other road, appointed to both positions at the instance of Mr. Kennedy, the attorney in fact and agent of the large majority of the bondholders, and Mr. Farley's duty to the court and to his employers would have required him to do everything in his power to further the consummation of an arrangement that he alleges, in his bill, "Mr. "Kennedy, as agent as aforesaid, strongly recommended" to "the bondholders." (Rec., 8.) If such information advice and cooperation were *of value*, then it was Mr. Farley's duty to place them at the disposal of the bondholders and Mr. Kennedy, and in giving such aid he was but doing his duty to his employers in furthering a disposition of their holdings believed to be favorable to the bondholders. On the other hand, if such information, advice and cooperation were *not of value*, then giving them did not constitute a consideration for even an implied promise upon the part of the associates to pay him for him.

2. But assuming acts done by appellant intended by him to be, and in fact being, in apparent part performance of *some* agreement, yet the so called agreement, alleged and attempted to be proved, cannot be the basis of a decree by way of specific performance, because,

First, the alleged agreement was *incomplete*, and lacks the element of *obligation* essential to make a *contract*.

"No specific performance of a contract can be decreed "in equity unless the contract be actually concluded and "be certain in all its parts. If the matter still rests in "treaty or if the agreement in any material particular "be uncertain or undefined, equity will not interfere."

Brown v. *Brown*, 6 Stewart Eq., 650, and cases cited.

Huddleston v. *Briscoe*, 11 Ves., 522.

Or, if it be reasonably doubtful whether the contract was finally concluded; the parties will be left to their remedy at at law.

Bormer v. *Wilson*, 2 C. E. Goern., (17 N. J. Eq.) 180.

It is not alleged that Messrs. Kittson and Hill "agreed "to purchase" the bonds; and it is scarcely to be supposed that they could have so agreed without knowing upon what terms the bonds could be obtained, if, indeed, they could be obtained at all. The alleged agreement was that they "*would* jointly undertake for their joint, mu-"tual and equal interest, benefit, advantage and profit, to "acquire, by purchase or contract," all the bonds of the two companies possible to be obtained for the purpose and with the *agreement* to use them in purchasing the railroad properties.

But when were they to "undertake" to acquire the

bonds? If at once, then were the parties bound as between themselves to acquire the bonds at whatever cost, so long as one of the parties should approve the price; if not, and all the parties must approve of and agree to the price to be paid, then the agreement was not complete, and required a further meeting of the minds of the parties before either could be bound. Suppose that an agreement was actually made as alleged, and that upon inquiry and negotiation it had been found that the bonds could be purchased at a price that in the judgment of one of the three would have insured the purchase of the railroad properties at a profitable figure, but in the judgment of the other two would have promised but a loss, would the agreement as alleged have bound those two to make the purchase at a price disapproved by them and approved by the third; or must the price to be paid for the bonds be approved and agreed upon by the three before either was bound to make the purchase of the bonds as a means of purchasing the properties? If the latter was the case, then it was still open to either of the three to withdraw from the project by declining to agree to the price acceptable to the others. In short, neither of the parties incurred any then present legal obligation to join in the purchase of the bonds and thereby the properties. And being in no way constrained by any legal obligation, either of the parties was free to make purchases as he might choose, either alone or in conjunction with others. There was no contract, because no legal obligation.

Or if the alleged agreement did impose a legal obligation merely to "undertake" to acquire the bonds upon terms satisfactory to the three, then how long a time must elapse, how many efforts must be made in

that direction before the agreement "to undertake to "acquire" the bonds would be exhausted and the parties released from the obligation to make further effort to acquire the bonds and railroad properties upon terms mutually satisfactory?

Moreover, how were the bonds and railroad properties to be purchased? Who was to supply the funds? Reading the first paragraph of subdivision 1 of the bill, one must infer either that the agreement was mere words, child's play, neither of the parties agreeing or expecting to furnish money, or the purchase being one to be undertaken for the joint, mutual and equal interest, benefit, advantage and profit of the three, that the three were to furnish the money equally. If this was the understanding, then the complainant could not, in any event, have relief without alleging and proving either that he contributed his share, or that, being ready, willing and able, he offered to contribute his share of the necessary fund. That by the terms of the alleged agreement neither of the parties to it undertook or was expected to furnish any money, is shown by the allegations of the last three paragraphs of subdivision 1 of the bill.

It is said defendant Kittson represented that he could procure from one Donald A. Smith, and others, the necessary funds that would be required in said undertaking; *but it is not alleged that he agreed to procure the money.* When it is remembered that the alleged agreement was to acquire all the bonds possible to be obtained as a means of purchasing the railroad properties, and that the very language "possible to be obtained" imports uncertainty in the minds of the parties as to how many bonds could be obtained, it is sufficiently absurd to allege or suppose that Mr. Kittson *represented* that he could procure the

necessary funds. But to have alleged that he *agreed* to procure the necessary funds in view of such uncertainty as to the amount, would have been even more absurd; and it is not so alleged. If the parties had agreed never so solemnly that they would purchase the bonds without themselves advancing any money, and neither party had *agreed to procure* the money, can it be said that such an agreement would have had the binding force of a contract? This is precisely what appellant alleged in his former bill in the State court and what he says in testimony in this case the parties did agree. In the former bill which was sworn to by Mr. Farley, he alleges: "that "it was *agreed* and understood between the plaintiff and "said Hill and Kittson, that *neither of them would be* "*required to raise or furnish any funds in said enterprise*, "but that the same *could* [not that it *should*] be procured "from or through the said Smith." (R., 1569.)

Now, was not the alleged agreement, if ever made, merely *an agreement to agree* in the future, first between themselves, and later with the bondholders, to buy a then unknown number of bonds at a then unknown price, with moneys which the parties agreed and understood "*could* be procured" from Mr. Donald A. Smith? In order that an agreement to agree with a third party shall be binding, *such agreement* to agree must either prescribe definitely what is to be the character and terms of the future agreement, or it must furnish a standard by which the character and terms of the future agreement may be ascertained.

In the very late case of *Shepard* v. *Carpenter*, 55 N. W. Rep., 906, the Supreme court of Minnesota, in an opinion remarkable for its lucidity and brevity, lays down and explains this principle. As the opinion would suffer

from an attempt to abbreviate it, and every word of it is in point, it is here given in full.

The court says:

"A contract between two persons, upon a valid consideration, that they will, at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and, upon a breach thereof, the party having the election or option may recover as damages what such particular contract to be entered into would have been worth to him, if made. But an agreement that they will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.

"The agreement herein sued on leaves essential terms of the future contract to be fixed by future agreement. It clearly contemplated that the logs to be cut and hauled should be delivered at some one place, but it does not specify what place, but, instead thereof, provides that the (future) contract shall be for plaintiff to cut into logs, 'haul and deliver at the boom or other place of delivery, to be in and by said contract agreed upon,' without indicating what boom, or where it may

" be. The place of delivery was manifestly left to be " agreed on, and, when agreed on, inserted in the fu- " ture contract. How payments were to be made by " plaintiff for logs sold by him was a matter of serious " importance, but all the contract says of it is: " One- " third of the selling price thereof in cash, to be paid " within ..... days after such sale shall be made.' " It is manifest the parties intended the future contract " to specify the number of days within which payment or " payments were to be made, but that they had not agreed " on the number of days, and so left it to be agreed on " and inserted in the future contract. A perhaps still " more important matter was within what time the logs " should be cut. All the contract says of that is 'that " the amount of timber or logs to be cut in any one year " shall be agreed upon, and be expressed in said contract.' " Where a final contract fails to express some matter, as, " for instance, a time for payment, the law may imply " the intention of the parties; but, where a preliminary " contract leaves certain terms to be agreed upon for the " purpose of a final contract, there can be no implication " of what the parties will agree upon."

In that case the parties had agreed *in writing*, to make a *future* contract between themselves, and yet the agreement was held unenforceable because *some essential terms* of the future agreement were not specified, and no standard fixed for determining them. In this case, the alleged agreement required not only a *future meeting of the minds* of the parties themselves, but that *after* they should have agreed among themselves, they must agree with third parties before there could be any contract to purchase the bonds as a means of acquiring the properties. The alleged agreement did not determine a single essen-

tial term, either of their future contract with each other, or of their intended contract with the bondholders.

Nor can it be urged with propriety that the elements essential to have made the alleged agreement a contract were afterwards supplied by the conduct of the parties, for the suit is founded upon *the alleged original agreement*, and not upon a *contract* arising out of any subsequent meeting of the minds of the parties.

In *Foster* v. *Wheeler*, L. R. 36 Ch. D., 695, an agreement had been made between Wheeler and Foster that Wheeler would enter into an agreement with Foster's landlord, Dr. Ord, for a lease at a rent of £140 per annum for such term and subject to such covenants as Ord should approve; and that Wheeler would accept such lease and execute a counterpart, and that Foster, upon such lease being granted, would surrender his lease. Upon bill for specific performance, or that being impracticable, for damages, it was held that Foster was entitled to recover damages from Wheeler for the breach of the agreement between them. It appeared that Dr. Ord was willing, and had offered to grant a lease at the named rent for twenty-one years, determinable by the tenant at seven or fourteen years, and that a draft of a lease was sent, the terms of which were not objected to, but no binding agreement was entered into by Wheeler with the lessor to accept the lease. Wheeler ultimately refused to proceed any further.

Kekewich, J., said: "I assent to the proposition on "behalf of the defendant that an agreement (such as oc- "curs here) to enter into an agreement cannot be ordered "to be specificially performed, on the ground that before "the court can properly make a decree of that character "it must be satisfied that the parties have contracted to

" do something of a definite character, something ascer-
" tained, or which can be readily ascertained, and some-
" thing too, which can be done by simple methods within
" the control of the court, and which the court can super-
" vise and, if need be, aid.

" But the proposition of the defendant goes beyond
" this. It is insisted broadly that an agreement to enter
" into an agreement is not a contract recognized by law,
" that is, is not enforceable. *An agreement between two*
" *persons, A and B, that one of them will either immedi-*
" *ately, or at some future time, or subject to the perfor-*
" *mance of some condition, enter into an agreement with*
" *the other is I think not enforcible, because it does not fall*
" *within the meaning of the term "contract" as defined by*
" *law.* Definitions of " contract " are to be found in the
" text-books, and I have consulted several of them, in-
" cluding an American one, that of Mr. Parsons. They
" are all founded on, and many of them simply adopt,
" the definition given by Pothier in part 1, chapter 1,
" section 1, of his work on contracts. This is
" his definition, which I take from the English
" translation of Mr. W. D. Evans: (1.) 'An agree-
" ment by which two parties reciprocally promise and en-
" gage, or one of them singly promises or engages to
" the other to give some particular thing, or to do or ab-
" stain from doing some particular act.' Mr. Pollock's
" definition in his work on the same subject (2) slightly
" differs from this, and is, in my opinion, more complete
" and more accurate. He defines a contract or rather an
" agreement to be 'an act in the law whereby two or
" more persons declare their consent as to any act or
" thing to be done or forborne by some or one of those
" persons for the use of the others or other of them';

" and in commenting on this definition he explains what " is intended by an act in the law, saying that it must be " on the face of the matter capable of having legal effect " and concerned with duties and rights which can be " dealt with by a court of justice. Accepting this defini- " tion, I think that *such a promise or engagement as I* " *have above suggested does not fall within it, for I do not* " *see how a court of justice can deal with a matter so un-* " *certain, or how, in other words, legal effect can be given* " *to a promise or engagement as an agreement when the* " *parties have not yet themselves determined what the* " *agreement is to be.*

* * * * *

" They are not, I think, at all applicable to a promise " or engagement by one of two parties to enter into an " agreement *of a character ascertained or capable of being* " *ascertained with a third*, and I see nothing in a promise " or engagement of that character to prevent its being a " contract capable on its face of having legal effect and " concerned with duties and rights which can be dealt " with by a court of justice. The breach, therefore, by " the defendant of the contract into which she entered " with the plaintiff by the first clause of the agreement " of the 9th of April, 1886, constitutes a cause of action."

When the case was heard on appeal (L. R., 38, Ch. D.), BOWEN, L. J., said:

" Then it is contended that the agreement is too un- " certain to be enforced. That is based upon a confusion " of ideas, it proceeds on the assumption that we are dis- " cussing the terms as between Dr. Ord and Miss " Wheeler. Now, suppose, there was nothing further " known about the terms of the lease than what we find " in this agreement, there would be no agreement of

"which specific performance could be enforced against "Miss Wheeler, either in the way of specific perform- "ance or damages, but if the agreement furnishes a "standard from which the terms can be ascertained, then "the maxim *id certum est quod certum reddi potest* ap- "plies. Here there is a contract by Miss Wheeler to en- "ter into an agreement, the terms of which are to be "dictated by Dr. Ord. If a person will bargain that in "seven days he will enter into an agreement for a lease "on terms to be determined by A. B., and then refuses "to do so, he must pay damages. It was attempted to "compare this case with one where a person agrees to do "what is impossible in law. If a person agrees to do what is "impossible in fact you have only to consider whether on a "fair construction of the agreement he made himself lia- "ble to pay damages if he did not do it; but if a person "binds himself to do what depends on the caprice of the "third person, he must suffer if he can not get that third "person to exercise his caprice in his favor."

In the foregoing case the "agreement to agree" was sustained because Miss Wheeler had agreed with the tenant, Foster, (who desired to be free of his lease), that she would enter into an agreement with the landlord, Dr. Ord, for a lease at a given rent for such term, and subject to such covenants as Ord should name; whereas as already shown under the agreement alleged in the bill in this suit, the agreement to "purchase or acquire" the bonds as a means of purchasing the properties, that is, *to enter into a contract with the bondholders*, did not fix the terms of the purchase, or provide any standard for fixing them. In other words, it left all parties at liberty and free not to agree, either among themselves or with the bond- holders.

b. There is no mutuality of obligation or of remedy in the alleged agreement.

And first as to mutuality of obligation. The advice, information and co-operation which Mr. Farley alleges was indispensable to the success of the enterprise must have tended either to or against the interests of the bondholders and the stockholders of the companies. It could not have been neutral in its effect. If his furnishing such advice, information and co-operation tended to secure better returns to the bondholders than they would have realized for the bonds in the absence of such an enterprise as the associates were engaged in, then manifestly, it was Mr. Farley's duty to furnish such aid information and co-operation, and the alleged agreement did not add any new obligation to that already imposed by his duty. If, on the other hand, the giving of such information, advice and co-operation as "should be required" of him, was hostile to the interests of the bondholders, and others concerned in the property, then the agreement to furnish such advice was a violation of his duty as receiver or general manager and imposed no obligation upon him. In either respect the alleged agreement did not *create* any obligation upon Mr. Farley's part, and therefore lacked the mutuality of obligation requisite to a binding contract.

Wood v. *Dickey*, (Va.), 17 S. E., 818 (July 13, 1893.)
Ford v. *Euker*, (Va.) 9 S. E. 500.

Next as to mutuality of remedy.

Mr. Farley can not obtain relief by way of specific performance, unless the same relief could have been granted against him if he had refused to comply with

his part of the alleged agreement, by giving advice, information and cooperation. "Both parties must, by the "agreement itself, have a right to compel specific per- "formance of it, else equity will not execute it."

"The contract or agreement sought to be enforced "must be mutual and the tie reciprocal, or a court of "equity will not enforce a performance."

Downey v. *Finney*, 53 Pa. St., 373,
Wood v. *Dickey*, *supra*.
Rutland Marble Co. v. *Ripley*, 10 Wall, 339.

Now, it is evident that if Mr. Farley had refused to give the advice, information and cooperation which he alleges he agreed to give, no decree for specific performance could have been entered against him.

Mowers v. *Fogg*, 45 N. J. Eq., 120.
Campbell v. *Rust*, (Va.), 8 S. E., 664.

c. For the reasons pointed out, the alleged agreement was radically lacking in all those elements essential to create *obligation*, without which an "agreement" is not a *contract*. But if it be assumed that there was an agreement to purchase the bonds, and with them the railroad properties, still the agreement, as alleged and attempted to be proved, is so vague, uncertain and indefinite as to the relative rights of the parties to it that under recognized principles of equity it cannot be the basis of a decree for specific performance.

"In all cases for specific performance the contract "must be accurately stated in the bill, and the proof in "every essential particular correspond with the contract "thus set up."

Carswell v. *Walsh*, (Md.) 17 A., 335; 70 Md., 504.
Williams v. *Morris*, 95 U. S., 444.

And "the contract which is sought to be specifically "executed must not only be proved, but the terms of it "must be so precise as that neither party could reasonably misunderstand them. If the contract is vague and "uncertain, or the evidence to establish it is insufficient, "a court of equity will not exercise its extraordinary "jurisdiction to enforce it, but will leave the party to his "legal remedy."

Lockerson v. *Stillwell*, 13 N. J., Eq. 357, and citations.
Colson v. *Thompson*, 2 Wheat., 336.
Carr v. *Duvall*, 14 Pet., 77.

"It (the contract) must be so free from ambiguity as "to leave no reasonable doubt as to the intention of the "parties."

Agard v. *Valencia*,, 39 Cal., 301.

In setting forth the alleged agreement Mr. Farley says it was further agreed that "if it should become necessary "to do so, the said Kittson might use or give to said "Smith and others furnishing the required funds, an interest with them in said purchases and enterprise, but "that the interest not so used or given should be retained "and held for the mutual joint and equal benefit of" Farley, Kittson and Hill.

Now, does this mean that Mr. Smith and others were to furnish the money to make the purchase of the bonds and thereby of the railroad properties, and that a certain definite interest in the properties was then to belong to

them and the rest to Messrs. Kittson, Hill and Farley? If so, then, instead of their giving the capitalists an interest in the enterprise, the capitalists were expected to buy the property outright and give the projectors Farley, Kittson and Hill an interest. Or does it mean that the capitalists were to furnish the money by way of loan, anp if so was the loan to be a charge upon the whole property when purchased, or upon only the shares of Messrs. Kittson, Hill and Farley? If it was to be a loan, the repayment of which was a charge upon the whole property, then it amounted to the capitalists paying for their own shares in the properties and advancing the money to pay for the shares of Messrs. Kittson, Hill and Farley.

If, on the other hand, the whole sum advanced was to be a loan to Messrs. Kittson, Hill and Farley, and to be entirely repaid out of their shares, then the capitalists were to receive an interest in the properties as a *bonus* for their money without really paying anything for that interest? Just what was it in which Mr. Farley was to have an interest? The bill does not answer any more definitely than that he was to have an interest in the enterprise.

In subdivision II of the bill Mr. Farley says that Mr. Kittson procured Donald A. Smith and George Stevens "to join in said enterprise and furnish funds to pur- "chase or secure the control and use of said bonds as far "as found practicable and to carry out said undertaking; "*and in consideration thereof* [that is of furnishing "(giving?) the funds] agreed to give said Smith and "Stevens a certain fractional interest in said enterprise," etc.

If the "enterprise" was the purchase of the railroad

properties then this allegation would indicate that Messrs. Smith and Stevens were to pay for the entire property and to own only a part of it—the balance going to Messrs. Kittson and Hill and to be shared by them equally with Mr. Farley.

Then it is alleged that the appellee company became vested with the railroad properties "for the use and "benefit of your orator and the said Kittson, Hill, Smith "and Stevens, in proportion to their several and respec- "tive interests in said bonds so purchased as aforesaid, "subject only to the advances made and obligations in- "curred in connection with said enterprise."

This seems to mean that the interests of the five were alike, subject to the advances made and obligations incurred, and, if such is the meaning, is it in accord with the agreement as alleged in subdivision I of the bill?

The vagueness and uncertainty in the allegations of the terms of the agreement are not accidental, but arise from conscious uncertainty in the mind of the pleader as will appear by a comparison of the bill filed in the State court with the bill in this case. In the old bill it is alleged that Mr. "Kittson represented he could procure one Donald A. "Smith to advance and furnish, *by way of a loan*, the "necessary funds that would be required in said under- "taking; and it was agreed and understood between plain- "tiff and said Hill and Kittson that neither of them would "be required to raise or furnish any funds in said en- "terprise." Furthermore, the old bill alleges that it was agreed that Mr. Kittson might give to "said Smith "or others furnishing the desired funds a two-fifths or "forty per cent. interest in said purchase to be made, "should it become necessary to do so in borrowing or "procuring the necessary funds to carry out said enter-

"prise; but that three-fifths or sixty per cent. interest in "said enterprise or undertaking should be reserved for "the plaintiff and said Hill and Kittson—that is to say, one-"fifth or twenty per cent for each—for their mutual and "equal advantage, profit and protection." But in the new bill there was to be no limit but that of *necessity* to the extent of interest to be given those furnishing the funds, and the words, "*by way of a loan*," are omitted, thus leaving it to be conjectured whether the money was to be procured *by way of a loan* or in some other way.

Now, is not the change in the allegations of the terms of the agreement very significient? Does it not show that appellant's idea of the agreement was very uncertain, and that it was so elastic that he could alter it at will when the decision of the Supreme court of Minnesota satisfied him that the agreement, as alleged in the old bill could not in any event be the basis of relief unless fortified by proof of facts that appellant knew he could not possibly establish, and the contrary of which he knew could be demonstrated? And even the old bill does not show whether the loan was to be a charge upon the whole properties, or only upon the alleged interests of Messrs. Hill, Kittson & Farley.

Moreover, Mr. Farley's testimony as to the alleged final interview in which, as alleged, the agreement was reached, is characterized by the same vagueness and uncertainty as to what interest in the enterprise Mr. Kittson might give to those furnishing the necessary funds, and what his interest was to be.

He says (page 73.):

"Mr. Hill had a great deal to say about how this interest "shall be divided. He gave his reasons by saying the "control should be kept in St. Paul; and that Mr. Kittson

" was to have one-fifth, I was to have one-fifth, Mr. Hill " was to have one-fifth, and the two-fifths were left to be " divided or given to the parties, Mr. Donald A. Smith " and his frriends, who were going to raise the money. *I* " *insisted that that was a matter that would have to be con-* " *sidered hereafter.* I thought it was a good plan to in- " terest some prominent citizens of St. Paul in this mat- " ter, on account of the future influence in the legisla- " ture, and otherwise for the benefit of the property.

" Mr. Kittson didn't say anything about that. He didn't " say whether he favored my view or Mr. Hill's. He " seemed to be indifferent on that subject, *and it was left* " *in about that way*, that three-fifths should be controlled " in St. Paul as Mr. Hill had suggested, one-fifth to Mr. " Kittson, and one to Mr. Hill and one to me.

" At that interview that was all that was said about the " division of the interests. It was left with that under- " standing."

Certainly this testimony shows not only that the alleged agreement was not concluded, but that the one feature of it most vital to Mr. Farley was " *left about in* " *that way.*" Nay, even more—Mr. Farley depicts himself as being the one " that insisted that that (the question " of the interests of the parties) was a matter that would " have to be considered * * * hereafter." And no claim is made by him that there was any subsequent interview in regard to this undetermined question.

IV.

THE ALLEGED AGREEMENT, IF EVER MADE, WAS CONTRARY TO PUBLIC POLICY, ILLEGAL, NULL AND VOID, CONFERRED NO RIGHTS UPON THE PARTIES TO IT, AND ITS EXECUTION CANNOT BE THE BASIS OF ANY RECOVERY BY ONE OF THE PARTIES AGAINST THE OTHERS.

The argument of appellees' chief counsel upon this branch of the law of the case is so exhaustive and convincing that it is doubtful whether it were not wiser to forbear any attempt to add to it even briefly. It would certainly subserve no useful purpose to attempt to traverse the same ground by an independent route. Standing therefore upon the vantage ground afforded by that argument and dismissing all question as to whether the alleged agreement, not being in writing, was obnoxious to the Statute of Frauds, and all question as to whether there existed in favor of appellant any trust in the railroad properties, through means of which he can lay claim to any share of the stock and bonds now representing those properties, the writer, making free use of the conclusions and of the language of the chief counsel, will assume the latter's propositions as already demonstrated, and will content himself with adding one or two authorities, and making a few suggestions.

First. The alleged agreement, upon which the appellant founds his suit, was illegal and utterly void in its inception, because made upon an illegal consideration and for an unlawful purpose. The consideration, if any, moving from appellant was executory in its nature and

consisted in the assumption of obligations that were in direct conflict with the fiduciary duties that appellant owed to the court, whose receiver he was, to the Dutch Committee and its constituents, whose special agent he was, and to the bondholders and stockholders interested in the property in his charge as receiver and general manager. The very making of the alleged agreement was a breach of trust. It not only contemplated and provided for the concealment from the court of appellant's interest in the enterprise of buying the bonds and through them acquiring the mortgaged property, but such concealment was absolutely essential to the success of the enterprise.

Mr. Farley's own testimony, not in answer to any question, but volunteered by him (Rec., 77) shows that, if the agreement was ever made, the parties to it understood it to be hostile to and incompatible with the performance of Mr. Farley's duties as receiver and general manager, and that therefore they "sacredly agreed" that his participation in the enterprise should be kept secret.

After answering a question not in the least relating to the matter, Mr. Farley said: "There is *one little cir-* "*cumstance* connected with the first interview I had with "Mr. Kittson and Mr. Hill that I forgot to mention "before. It may be important or unimportant, I "don't know." And then with a *naivete* rarely found in a man of Mr. Farley's age and experience, he goes on circumstantially to give that portion of the interview which culminated in the resolution of the parties to the alleged agreement to keep the fact of Mr. Farley's interest and part in it a secret.

At another place in his testimony, Mr. Farley reveals his own consciousness that the alleged agreement was a

violation of his fiduciary duties as receiver and general manager. On cross-examination as to certain depositions given by him in certain suits to set aside the foreclosure sales, Mr. Farley was asked (Rec., 150):

" And was not the following question put to you, and " the following answer given;

" ' Q. What connection or interest, if any, had you in " ' that combination?

" ' A. Well, sir, I originated the scheme, and I thought " ' I was interested. In '76 Mr. Hill, Mr. Kittson and my- " ' self, late in the year, associated ourselves togother for " ' the purpose of buying those bonds of the St. Paul & " ' Pacific Company, and the First Div. Company.' Did " ' you give those two answers which I have stated to " ' you in answer to those two questions which I have " ' stated to you? "

" Counsel for the complainant makes the same objec- " tion to the last question, which they have made to the " question preceding the same.

" A. I couldn't, from my present memory, state posi- " tively what I said on that occasion. The affidavits, as " represented to here by Mr. O'Donnell, ought to be " proof of it. I know that Mr. Gilman sent a very long " list of questions. My attorney, Mr. Griffith, was con- " sulted, *and there was questions which was calculated to " criminate myself as interested with Mr. Hill, Kittson " and myself;* but what I did answer ought to show by " the returns made by the notary public, Mr. O'Donnell. " I do not recollect the questions I answered on that oc- " casion. Judge Young was there and he ought to know " as much as I know about it."

Appellees' counsel could not place a more severe stigma upon Mr. Farley's conduct than this very answer of his own has stamped upon it.

Judge Young has already referred to Mr. Farley's testimony to the effect that one of the particular services that he rendered to the associates was in dissuading Mr. Hill from sending a man to Holland to buy bonds, "because," as he says, "if it was known that there was an "American purchaser, the price of the bonds "would go up, and that was not the class of bonds "we wanted to buy." If Mr. Hill in fact ever dreamed of such a thing as sending a man to Holland for that purpose and Mr. Farley did in fact dissuade him from that course, then most clearly, if that were his sole part in the enterprise, it would alone be sufficient to show the irreconcilable conflict between his duty as receiver and general manager and his interest as a member of the purchasing syndicate.

At another place in his testimony (Rec., 74), already quoted, Mr. Farley says: "The Dutch committee of "bondholders, as it was known, held and had under their "control a very large majority of each class of "these bonds and, they were the bonds we "wanted to buy to inherit the property—could do it "in no other way. *At the foreclosure sale a large ma-*"*jority of the bondholders would be the purchasers.*"

Now, manifestly, this means (and we know it to be the common experience) that at the foreclosure sales no one could well compete as purchasers with the holders of a large majority of the bonds. Is it not clear, therefore, that by lending his aid to the purchase of the majority of the bonds at such a price as to promise handsome profit to the purchasers, Mr. Farley was participating in a scheme, the inevitable effect of which must have been to discourage competition at the foreclosure sales, and, therefore, to reduce the dividends that outside bondholders

would receive, and to destroy all possibility of anything being left for the stockholders.

To the numerous cases cited by Judge Young, may be added the case of *Smith* v. *Townsend*, 109 Mass., 500. In that case the plaintiff, Smith, while employed as agent of the owner to sell certain lots of land, agreed with the defendant to *put him in communication with Patridge, the owner of the lots*, so that the defendant could purchase them. In consideration thereof, defendant agreed, in writing, to convey one of the lots to one Wallace, as trustee for Smith, on payment of $300.50. The owner, Patridge, having sold and conveyed to Townsend, Smith then tendered the price, $300.50, to him, and demanded a conveyance of the lot, but Townsend refused to convey. Smith filed his bill in equity to enforce specific performance.

The court said:

"On looking at the record we find that the bill con-
"tains in substance the charge that the plaintiff Smith,
"while employed as agent to sell the premises, of which
"the lot in question was a part, agreed with the defend-
"ant that he would put him in communication with his
"principal, the owner of the lots, so that the defendant
"could make the purchase, in consideration that he would
"convey to Smith one of the lots so purchased. This is
"a consideration alleged for the contract sought to be
"enforced, and as thus alleged is manifestly illegal. It
"was a contract made by Smith upon a consideration
"founded in a direct violation of his duty, and in fraud of
"the rights of his principal. Such a contract cannot be
"be enforced in any court. A man cannot, without the
"consent of his principal, become the purchaser for
"his own use and benefit of property which is entrusted

" to him to sell. The rights of the principal would be in " too much danger from the conflict of the adverse inter- " ests. *Farnsworth* v. *Hemmer*, 1 Allen, 494; *Walker* " v. *Osgood*, 98 Mass., 348; Story on Agency, Sects. " 210–214."

The case of *Jacobs* v. *George*, 20 Pac. Rep., 183, is also a very well considered case to the same effect. Indeed the opinion is characterized by remarkable directness and vigor.

Second. The alleged agreement by which appellant was to have an interest in the railroad properties being illegal, null and void, in its inception, appellant cannot maintain this suit to recover from the other parties to the alleged agreement such portion of the stock and bonds of the appellee company as now represent his alleged interest in the railroad properties.

Concluding a lucid analysis of the case of *Brooks* v. *Martin*, 2 Wallace, appellees' chief counsel says:

" We submit, then, that the case of *Brooks* v. *Martin*, " was, and was understood by the court to be the case of " a lawful partnership engaged in an illegal business, the " fruits of which were sought to be brought under the " operation of the previously made and entirely lawful " contract of partnership; and being such a case, it is in " full accord with principle and the authorities, but lends " no aid to the contention of the plaintiff in this case."

It seems to the writer that this is the true view of the case of *Brooks* v. *Martin*.

But, suppose, on the other hand, that not only the business was illegal, but that the partnership was illegal, because formed for the transaction of an illegal business. Suppose that the articles of partnership had in terms declared

that its business should be the purchase of soldier's claims to land warrants. Now, after transacting the illegal business for some time, the partners Brooks and Martin met together and proposed to have a settlement. Brooks was in possession of all the assets and might, if he had chosen, have refused to acknowledge Martin's interest, or to come to any settlement. Instead of that he admitted that Martin had an interest in the assets in his (Brooks) possession, and admitted the proportion of those assets to which Martin was entitled. He thereby, in effect, acknowledged himself a trustee to that extent for Martin's benefit, and proposed to make settlement with him upon the basis of that interest. Having conceded his interest, having undertaken to settle on the basis of that interest, he was bound to settle fairly, and when he defrauded Martin in that settlement, Martin was entitled to have the settlement set aside, and to have an accounting, not upon the basis of the original agreement of partnership, but upon the implied promise of Brooks to settle upon the basis of Martin's conceded interest.

This is substantially the theory of *Planters' Bank* v. *Union Bank*, 10 Wallace, 483. The facts in that case were these (adopting much of Judge Young's language):

During the rebellion the Union Bank of New Orleans was the correspondent of the Planters' Bank at Natchez, apparently under a contract of general agency, such as subsists between banks of smaller towns or cities, and their correspondents in the large financial centers, and embracing within its scope the collection and sale of notes, drafts, bonds, coupons and other securities, transmitted by the principal to the agent for sale or collection, and the crediting and remitting of the proceeds on general account, or if specially

directed, remitting the proceeds of any particular transaction when completed. In this state of the relation between the banks a large balance accumulated in favor of the Planters' and stood to its credit on the books of the Union, and in the account rendered by the latter to the former. This balance was made up of the proceeds of collections and sales of securities, and, among other things, of the proceeds of the sales of confederate bonds. One question in the case was upon the liability of the Union Bank to account for the proceeds of the sale of these bonds. The court, in holding the Union Bank to be liable, said:

"But when the illegal transaction has been consummated, when no court has been called upon "to give aid to it, when the proceeds of sales "have actually been received, and received in that "which the law recognizes as having had value; *and* "*when they have been carried to the credit of the plaintiffs*, "*the case is different.* The court is there not asked to "enforce an illegal contract. The plaintiffs did not re- "quire the aid of any illegal transaction to establish their "case. It is enough that the defendants have in hand a "thing of value that belongs to them. Some of the au- "thorities say that although an illegal contract will not "be executed, yet when it has been executed by the "parties themselves, and the illegal object of it has been "accomplished, *the money or thing which was the price* "*of it may be a legal consideration between the parties for* "*a promise, express or implied;* and the court will not "unravel the transaction to discover its origin."

The potent fact in that case seems to have been that the Union Bank had voluntarily carried to the credit of the Planters Bank the proceeds of the bonds, and the

right of the Planters to recover those proceeds, notwithstanding they were the avails of Confederate bonds, arose out of the admission and implied promise of the Union Bank, when it carried the moneys to the credit of the Planters, and not out of the contract to sell the bonds for the account of the Planters. And as if to anticipate the objection that such a declaration, or acknowledgment on the part of the Union Bank could not raise an implied promise and create a right of action because not made upon a consideration, the court said that the money or thing which was the price of the illegal agreement might be "a legal consideration between the "parties for a promise, express or implied." Now does not this free the case of *Brooks* v. *Martin*, from any difficulty? Is it really necessary to determine from the somewhat obscure report of that case whether the partnership between Brooks and Martin was an illegal partnership, or whether it was a legal partnership transacting an illegal business? Was it not sufficient that even if the partnership were illegal, so that Brooks could have defeated Martin's action to recover upon *the contract of partnership*, he nevertheless voluntarily admitted Martin's interest, and undertook to account with him fairly upon the basis of that interest. Having so undertaken, and having admitted himself a trustee for Martin to the extent of that interest, he was bound to account fairly; and the moneys and property in his hands, though they were the proceeds of an illegal traffic, were under the authority of *Planters Bank* v. *Union Bank*, "a legal consideration," for Brooks' admission of Martin's interest, and his undertaking to account to Martin on the basis of that interest.

The cases of *Brooks* v. *Martin* and *Planters Bank* v.

Union Bank, 16 Wallace, have received the construction contended for by Judge Young, not only in the late case of *Dent* v. *Ferguson*, 132 U. S., cited by him, but also in the case of *Armstrong* v. *American Exchange National Bank*, 133 U. S., 467.

It is respectfully submitted that the decree of the lower court should be affirmed.

JOHN MAYNARD HARLAN,
Associate Counsel for Appellee, St. Paul Trust Company, Executor, etc.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. [illegible]

JESSE P. FARLEY,

Appellant.

vs.

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, as Executor of the last will of Norman W. Kittson, deceased, and THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,

Appellees.

ARGUMENT FOR APPELLEES.

M. D. GROVER,
GEO. B. YOUNG,
Counsel for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

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Appellees.

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I. Letters and Telegrams Between Jesse P. Farley and J. S. Kennedy & Co., Relating to the Negotiations for Purchasing the Bonds Held by the Dutch Committee; Chronologically Arranged.

NO.	PAGE			
139.	1,492.	June 3, 1876.	Letter.	J. P. Farley to J. S. Barnes.
C. 87.	252.	" 9, "	"	J. S. Barnes to J. P. Farley.
		Aug. 17, "	"	" to " (not produced.
140.	1,492.	" 23, "	"	J. P. Farley to J. S. Barnes.
C. 108.	266.	Dec. 18, "	"	J. S. Barnes to J. P. Farley.
C. 115.	276.	Feb. 6, 1877.	"	" to "
C. 132.	289.	June 27, "	"	J. S. Kennedy & Co. to J. P. Farley.
84.	1,015.	" 30, "	"	J. P. Farley to J. S. Kennedy & Co.
C. 173.	323.	Aug. 21, "	Telegram,	J. S. Kennedy & Co. to J. P. Farley.
C. 174.	"	Translation of C. 173.		
86.	1,016.	Aug. 21, 1877.	Telegram,	J. P. Farley to J. S. Kennedy & Co.
C. 175.	324.	" 22, "	"	J. S. Kennedy & Co. to J. P. Farley.
C. 145.	302.	" 22, "	Letter,	" to "
87.	1,017.	" 22, "	Telegram,	J. P. Farley to J. S. Kennedy & Co.
C. 180.	324.	" 30, "	"	J. S. Kennedy & Co. to J. P. Farley.
C. 181.	325.	Translation of C. 180.		
C. 182.	"	Sep. 3, 1877.	Telegram,	J. S. Kennedy & Co. to J. P. Farley.
C. 183.	"	Translation of C. 182.		
C. 184.	"	Sep. 5, 1877.	Telegram,	J. S. Kennedy & Co. to J. P. Farley.
C. 185.	326.	Translation of C. 184.		

C. 187.	211.	Sep.	6, 1877.	Telegram,	"	to "
C. 147.	303.	"	6, "	Letter,	"	to "
C. 64.	234.	"	8, "	"	J. P. Farley to J. S. Kennedy & Co.	
C. 192.	327.	Sep.	21, 1877.	Telegram,	J. S. Kennedy & Co. to J. P. Farley.	
88.	1,017.	"	21, "	"	J. P. Farley to J. S. Kennedy & Co.	
89.	"	"	24, "	"	" to "	
C. 149.	304.	"	24, "	Letter,	J. S. Kennedy & Co. to J. P. Farley	
C. 193.	327.	"	24, "	Telegram,	"	to "
C. 194.	"	"	25, "	"	"	to "
90.	1,017.	"	26, "	Letter,	J. P. Farley to J. S. Kennedy & Co.	
91.	1,018.	"	27, "	"	" to "	
C. 150.	307.	"	28, "	"	J. S. Kennedy & Co. to J. P. Farley.	
C. 153.	309.	"	29, "	"	"	to "
C. 154.	310.	Oct.	2, "	"	"	to "
C. 195.	327.	"	9, "	Telegram,	"	to "
C. 197.	328.	"	10, "	"	"	to "
C. 155.	312.	"	10, "	Letter,	"	to "
C. 198.	328.	"	11, "	Telegram,	"	to "
C. 199.	"	"	12, "	"	"	to "
C. 200.	"	"	19, "	"	"	to "
C. 201.	329.	"	20, "	"	"	to "
93.	1,018.	"	22, "	"	J. P. Farley to J. S. Kennedy & Co.	
61.	1,003.	"	23, "	Letter,	" to "	
C. 158.	315.	Jan.	7, 1878.	"	John S. Kennedy to J. P. Farley.	
45.	992.	"	26, "	"	J. S. Kennedy & Co. to "	
C. 160.	316.	Feb.	8, "	"	"	to "
71.	1,008.	"	15, "	"	J. P. Farley to J. S. Kennedy & Co.	
C. 161.	317.	"	18, "	"	J. S. Kennedy & Co. to J. P. Farley.	
46.	993.	"	19, "	"	"	to "
72.	1,009.	"	22, "	"	J. P. Farley to J. S. Kennedy & Co.	
C. 162.	317.	"	25, "	"	John S. Kennedy to J. P. Farley.	
47.	994.	"	27, "	"	J. S. Kennedy & Co. to "	
C. 163.	318.	Mch.	9, "	"	John S. Kennedy to J. P. Farley.	
62.	1,004.	"	9, "	"	J. P. Farley to John S. Barnes.	
56.	998.	Apl.	4, "	"	John S. Kennedy to J. P. Farley.	

II. *Letters and Telegrams Relating to Mr. Farley's Private Purchases of Bonds.*

NO.	PAGE.			
61.	1,003.	Oct. 23, 1877.	Letter,	J. P. Farley to J. S. Kennedy & Co.
62.	1,004.	Mch. 9, 1878.	"	" to J. S. Barnes.
128.	1,303.	June 7, "	"	J. J. Hill to Geo. Stephen.
63.	1,005.	" 18, "	"	J. P. Farley to J. S. Kennedy & Co.
52.	996.	" 21, "	"	J. S. Kennedy & Co. to J. P. Farley.
64.	1,005.	" 28, "	"	J. P. Farley to J. S. Kennedy & Co.
51.	996.	July —, "	"	J. S. Kennedy & Co. to J. P. Farley.
65.	1,006.	" 20, "	"	J. P. Farley to J. S. Kennedy & Co.
66.	"	" 22, "	"	" to "
27.	934.	" 26, "	"	Geo. Stephen to J. J. Hill.
53.	997.	" 26, "	Telegram,	J. S. Kennedy & Co. to J. P. Farley.
67.	1,007.	" 26, "	Letter,	J. P. Farley to J. S. Kennedy & Co.
60.	1,002.	" 27, "	"	John S. Kennedy to J. P. Farley.
54.	997.	" 30, "	Telegram,	J. S. Kennedy & Co. to "
68.	1,007.	" 31, "	"	J. P. Farley to J. S. Kennedy & Co.
69.	1,008.	" 31, "	Letter,	" to "
70.	"	Aug. 9, "	"	" to "

III. *Letters as to the Giving of Notes and Securities by Messrs. Kittson and Hill.*

NO.	PAGE.		
123.	1,301.	Feb. 8, 1878.	J. J. Hill to Geo. Stephen.
20.	919.	" 10, "	Geo. Stephen to J. J. Hill.
21.	921.	Mch. 4, "	" to "
22.	"	June 4, "	" to "
127.	1,303.	" 7, "	J. J. Hill to Geo. Stephen.
30.	937.	Oct. 18, "	Geo. Stephen to J. J. Hill.
23.	922.	" 25, "	" to "
24.	"	Nov. 2, "	" to "

Also, on the same subject.

14.	915.	Agreement between the Associates January 21, 1878,
118.	1,268.	" " " March 27, 1878.
122.	38.	" with Dutch Committee (Art. IX) March 13, 1878.
C. 203.	422.	Bond to Dutch Committee, annexed to report of Mr. Reynolds.
160.	1,561.	Order of May 31, 1878, for building lines. (Par. V.)
161.	1,563.	Agreement of Associates pursuant to No. 160.

IV. Letters Showing Policy of Associates in Dealing with Outstanding Bondholders and the Stockholders.

NO.	PAGE.			
128.	1,303.	June 7,	1878.	J. J. Hill to Geo. Stephen.
129.	1,306.	" 22,	"	" to "
26.	932.	July 24,	"	Geo. Stephen to J. J. Hill.
27.	934.	" 26,	"	" to "
28.	935.	" 30,	"	" to "
29.	"	Sep. 10,	"	" to "
30.	937.	Oct. 18,	"	" to "
32.	938.	Dec. 24,	"	" to "
131.	1,309.	" 26,	"	J. J. Hill to Geo. Stephen.
132.	1,311.	" 29,	"	" to "
33.	939.	" 30,	"	Geo. Stephen to J. J. Hill.
34.	940.	Jan. 3,	1879.	" to "
35.	941.	" 4,	"	" to "
36.	942.	" 7,	"	" to "
37.	943.	" 15,	"	" to " (Telegram.)
38.	944.	" 17,	"	" to "
39.	"	" 17,	"	" to "
C. 165.	319.	Jan. 30,	"	John S. Kennedy to J. P. Farley.
41.	945.	" 30,	"	Geo. Stephen to J. J. Hill. (Telegram.)
42.	"	Feb. 1,	"	" to " "
55.	997.	" 17,	"	J. S. Barnes to " (Error in Date.)
C. 167.	320.	" 15,	"	J. S. Kennedy & Co. to J. P. Farley.

V. Letters Showing the Views of the Associates as to Mr. Farley's Relation to the Enterprise, and Showing the Means Used by Them to Influence Him Through J. S. Kennedy & Co.

NO.	PAGE.			
121.	1,300.	Aug. 23,	1877.	J. J. Hill to Geo. Stephen.
56.	998.	Apl. 4,	1878.	John S. Kennedy to J. P. Farley.
48.	995.	May 25,	"	J. P. Farley to Judge Dillon. (Telegram)
128.	1,303.	June 7,	"	J. J. Hill & N. W. Kittson to Geo. Stephen.
102.	1,024.	" 10,	"	Geo. Stephen to J. S. Kennedy & Co. (Telegram.)
50.	996.	" 10,	"	J. S. Kennedy & Co. to J. P. Farley. (Telegram.)

57.	999.	"	10,	"	John S. Kennedy to "
146.	1,495.	July	8,	"	J. S. Kennedy & Co. to "
58.	1,000.	"	10,	"	John S. Kennedy to "
104.| 130.|	1,025.| 1,308.|	"	22,	"	J. J. Hill to Geo. Stephen.
103.	1,024.	"	25,	"	Geo. Stephen to J. S. Kennedy & Co.
106.	1,027.	"	23,	"	J. J. Hill to Geo. Stephen.
105.	1,026.	"	26,	"	Geo. Stephen to J. S. Kennedy & Co.
27.	934.	"	26,	"	" to J. J. Hill.
60.	1,002.	"	27,	"	John S. Kennedy to J. P. Farley.
108.	1,028.	Aug.	30,	"	J. J. Hill to Geo. Stephen.
107.	"	Sep.	3,	"	Geo. Stephen to J. S. Kennedy & Co.
29.	935.	"	10,	"	" to J. J. Hill.
109.	1,030.	"	10,	"	" to J. S. Kennedy & Co.
32.	938.	Dec.	24,	"	" to "
31.	"	"	25,	"	" to J. J. Hill.
131.	1,309.	"	26,	"	J. J. Hill to Geo. Stephen.
33.	939.	"	30,	"	Geo. Stephen to J. J. Hill.
132.	1,311.	"	29,	"	J. J. Hill to Geo. Stephen.
34.	940.	Jan.	3,	1879.	Geo. Stephen to J. J. Hill.
35.	941.	"	4,	"	" to "
147.	1,496.	"	4,	"	" to J. P. Farley.
114.	1,037.	Feb.	12,	"	" to J. S. Kennedy & Co.
C. 167.	320.	"	15,	"	J. S. Kennedy & Co. to J. P. Farley.
55.	997.	"	17,	"	John S. Barnes to J. J. Hill. (Error in Date.)

VI. Correspondence Between Messrs. Kittson and Hill and Johan Carp, in 1877.

[The letters and telegrams from Messrs. Hill and Kittson are Exhibit E. to Mr. Carp's deposition.]

PAGE.					
529.	Jan.	29,	1877,	from Kittson & Hill.	Letter.
532.	Apl.	17,	"	" "	Telegram.
533.	May	21,	"	" "	"
"	"	26,	"	" "	Letter.
534.	July	5,	"	" "	Telegram.
"	"	24,	"	" "	"
Ex. 8. 911.	"	11,	"	" John Carp.	Letter.
534.	"	31,	"	from Kittson & Hill.	Telegram.
"	"	31,	"	" "	Letter.
537.	Sep.	14,	"	" "	"
539.	"	29,	"	" "	Telegram.
538.	Oct.	18,	"	" "	Letter.

And in connection with this correspondence may be read the following:

("C." *indicates Complainant's Exhibits.*)

NO.	PAGE.		
C. 108.	266.	Dec. 18, 1876.	John S. Barnes to J. P. Farley.
C. 115.	276.	Feb. 6, 1877.	" to "
C. 132.	289.	June 27. "	" to "
C. 136.	294.	July 30, "	J. Carp to "
90.	1,017.	Sep. 26, "	J. P. Farley to J. S. Kennedy & Co.
91.	1,018.	" 27, "	" to John S. Barnes.
C. 153.	309.	" 29, "	J. S. Kennedy & Co. to J. P. Farley.

VII. Papers from the Files and Records in the Suit of J. S. Kennedy et al. v. St. Paul & Pacific Railroad Co. et al., in which Plaintiff was Appointed Receiver.

NO.	PAGE.	
5.	838.	Order to show cause, bill of complaint, affidavits, etc.
120.	1,273.	Mr. Delano's speech, Feb. 12, 1875, containing
	1,282.	Order appointing receiver.
	1,288.	Modifying order.
	1,289.	Copies of telegrams showing authority of J. S. Kennedy & Co.
155.	1,543.	Order of Aug. 1, 1873, appointing Jesse P. Farley, receiver.
156.	1,549.	Modifying order of Sept. 1, 1873.
157.	1,551.	Order of Dec. 19, 1874, requiring plaintiffs to file powers of attorney.
3.	831.	Power of attorney, Lippmann, Rosenthal & Co. to John S. Kennedy.
4.	834.	Power of attorney, Dutch Committee to John S. Kennedy.
158.	1,551.	Order of Dec. 19, 1874, requiring receiver's salary to be paid by plaintiffs.
159.	1,552.	Petition of J. P. Farley, April 4, 1878, for leave to complete line by means of debentures, with order to show cause, etc.
C. 202.	408.	Order of April 18, 1878, appointing Messrs. Henderson and Reynolds a commission to inquire and report.
C. 203.	410.	Separate report of Mr. Reynolds, May 7, 1878.
C. 204.	424.	" " of Mr. Henderson, "
C. 205.	433.	Joint " of Messrs. Henderson and Reynolds.
25.	923.	Draft of proposed order, accompanying the joint report. (C. 205)
160.	1,559.	Order of May 31, 1878, for completion of the lines with funds to be furnished by Messrs. Stephen, Smith, Kittson and Hill.

161.	1,563.	Agreement of Messrs. Stephen, Smith, Kittson, and Hill, required by No. 160, to comply with that order, etc.
162.	1,564.	Report of J. P. Farley, receiver, of work done and money furnished under the order of May 31, 1878, (No. 160.) Dated Nov. 13, 1878.
C. 206.	434.	Report of inspection of lines.
C. 207.	436.	Certificate of acceptance of lines by Governor of Minnesota.
C. 240.	1,727.	Petition of Geo. Stephen and associates for issuance of debentures.
C. 211.	949.	Order Dec. 20, 1878, for issuance of debentures.
C. 209.	449.	" June 23, 1879, that the receiver turn over the railroads, etc., to the St. Paul, M. & M. Ry. Co., the purchaser at the decretal sale.
163.	1,568.	Application of Jesse P. Farley, April 5, 1883, for discharge from receivership.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

No. 287.

JESSE P. FARLEY,

Appellant,

vs.

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, as Executor of the last will of Norman W. Kittson, deceased, and the ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY,

Appellees.

ARGUMENT FOR THE APPELLEES.

This suit grows out of the purchase by the defendant James J. Hill, the late Norman W. Kittson (who was also a defendant) and George Stephen and Donald A. Smith of Montreal, Canada, of the mortgage bonds of the St. Paul & Pacific Railroad Company (styled for brevity, the St. Paul & Pacific Co.) and of the First Division of the St. Paul & Pacific Railroad Company, (for brevity styled the First Div. Co.) The purchases were made by these four gentlemen in their own names. The first purchase was made early in 1878. It comprised most of the bonds in the hands of a committee of bondholders, known as the "Dutch committee,"—being a majority of each of the several issues.

The same four gentlemen next proceeded to make other purchases of bonds, and purchased also the stock of the two companies. They also purchased all the property of the two companies at sales under decrees of foreclosure, in the spring and summer of 1879, a part in their own names and a part in the name of the St.

Paul, Minneapolis & Manitoba Ry. Co., (for brevity styled the Manitoba Co.,) a corporation organized for the purpose of acquiring and operating the properties of the two first named companies. And the properties so bought now form a part of the Manitoba system. At the sale under each decree they used in part-payment the bonds held by them secured by the mortgage thereby foreclosed.

The plaintiff claims that although his name did not appear among the purchasers, he was, in fact, from the outset an associate with the four gentlemen named, having the same interest with Mr. Kittson and Mr. Hill in each purchase and in the stock of the Manitoba Co. and other profits of the transactions, which, he says, exceeded $15,000,000; but that his interest therein was to be and was kept concealed by reason of his official relation to the two original companies as receiver of the St. Paul & Pacific Co., and general manager for the mortgage trustees in possession of the First Div. Co.

The plaintiff's case, upon his bill and his evidence, is that he and one Fisher, his official assistant, originated the enterprise; that by reason of his relation to the two companies (he was appointed receiver August 1, 1873, and took his place as general manager of the First Division lines *for the company*, March 13, 1876, and *for the trustees in possession*, on October 9, 1876,) he had acquired much information as to the properties and the indebtedness of the two companies, which was indispensable to such an enterprise, and without which it could not be undertaken, and which none of the other gentlemen possessed; that *after becoming general manager*, (March 13, 1876,) he had also acquired knowledge, equally indispensable and not possessed by any of the others, as to the market quotations of the bonds in Holland, (where nearly all of them were held, and where the outstanding bonds, not held by the committee, and also the certificates issued by the committee for bonds deposited with it, were bought and sold at the stock exchange,) and as to how the bonds could be procured, and as to how such an enterprise should be conducted to a final purchase of the properties and the organization of a new company.

He further claims that (in *the summer* of 1876 according to the

bill and his own and Fisher's *original* testimony) Fisher first communicated the idea of the project to Mr. Hill, and explained to him the condition of the property, prices of the bonds, and other matters of which up to that time Mr. Hill was ignorant. That Mr. Hill caught at the idea, and induced Fisher to aid him in attempting to enlist Mr. Kittson in the project. That their first attempts met with scant success, little if any impression being made upon Mr. Kittson. That afterwards, at Mr. Kittson's request, Fisher had a private Sunday interview with him, and informed him of the location and physical condition of the property, the several issues of the mortgage bonds and their amount, and of other matters relating to the enterprise (of all which up to that time Mr. Kittson had been as ignorant as Mr. Hill;) and that Mr. Kittson finally concluded that he would undertake the enterprise, (being satisfied that he could obtain the requisite funds therefor from Messrs. Smith and Stephen,) if plaintiff would join them, and not otherwise, because neither Mr. Hill nor himself knew anything about a railroad, and it would be folly for them to undertake such an enterprise without a man of railroad ability and experience, like Farley, to manage the property after they got it; and he, as well as Mr. Hill, had great confidence in Mr. Farley on account of the great changes he had made in the First Div. property since taking charge of it, (March 13, 1876;) and, besides, they would need Mr. Farley to tell them what prices to pay for the bonds.

Plaintiff and Fisher further say that the educating of Mr. Hill and Mr. Kittson and the overcoming of Mr. Kittson's reluctance consumed at least a month, at the end of which time a meeting was had, at which Fisher was present, and at which the plaintiff and Messrs. Kittson and Hill made the alleged agreement on which this suit is founded, by which agreement, as plaintiff claims, they formed an association or partnership into which Mr. Kittson was to bring Messrs. Smith and Stephen should they agree to furnish on satisfactory terms the necessary millions to carry out the enterprise. It was expected that a two-fifths interest in the enterprise would satisfy the demands of Messrs. Smith and Stephen, in which case the plaintiff and Messrs. Kittson and Hill would each have one-fifth; but whatever might be allotted to Messrs. Smith and

Stephen, the interest not given them should belong equally to and be divided equally among the plaintiff and Hill and Kittson.

The plaintiff further contends that afterwards Messrs. Hill and Kittson brought Mr. Smith and Mr. Stephen into this enterprise so originated by himself, and that all the subsequent transactions between those four gentlemen and all the purchases of the bonds, the stocks, and the properties of the two companies, were under and in furtherance of the agreement between plaintiff and Messrs. Kittson and Hill, and in prosecuting the enterprise then undertaken.

The plaintiff's averments and proofs thus fall naturally into three classes:

1. Those introduced to show that plaintiff had acquired and posssessed that peculiar knowledge, experience and ability, (not possessed by the others,) which were, and were considered by Messrs Kittson and Hill, indispensable to such an enterprise; in other words, to show the inherent probability of the agreement.

2. Those introduced to show that plaintiff originated the project and to show the negotiations that took place between the parties resulting in the agreement in question, the terms of that agreement, and the times and places when and where the negotiations were had and the agreement consummated.

3. Those introduced to show what was done in the way of purchasing the bonds, etc., after the agreement was formed; these being introduced to show

(a) conduct of the parties in recognition of the agreement, or otherwise tending to show its existence;

(b) that the enterprise pursued and achieved by Messrs. Smith, Stephen, Kittson and Hill was the same enterprise agreed on between plaintiff and Messrs Kittson and Hill, and that the transactions which resulted in the acquisition of the property a share of which the plaintiff seeks to obtain, were transactions under and in furtherance of the agreement in question, and contemplated by it, and within its scope;

(c) that plaintiff furnished the peculiar information, etc., and that such information and his guidance were indispensable to the success of the enterprise.

Under the *first* head, plaintiff has shown in detail his sources of

knowledge, resulting from his connection with the property, and has introduced much documentary evidence, including correspondence between himself and Messrs. J. S. Kennedy & Co., of New York, the agents of the Dutch committee, to whom the plaintiff, as representing the bondholders, looked for, and from whom he received, his compensation as receiver, and his instructions.

Under the *second* head, the evidence is solely the oral testimony of plaintiff and Fisher. For reasons that will be made fully to appear, the most plausible (and, as we claim, the only possible) time for making such an agreement as that alleged was in the late summer or in the autumn of 1876, *after* plaintiff had acquired that information in regard to the First Div. property and indebtedness which it is conclusively shown, and which he himself admits, he did not possess prior to March 13, 1876; *after* he had the opportunity to display that ability in the management of the First Div. property, and to make those improvements in it, which, as he says, so impressed Mr. Kittson as to make him insist on plaintiff joining in the enterprise as a condition of himself undertaking it; *after* the breaking off (August 13, 1876,) of a compromise that had been made between the stockholders and the bondholders; and *before* certain negotiations of Messrs Kittson and Hill with one Johan Carp, a member of the Dutch committee, with which negotiations the plaintiff was made acquainted at the time by Mr. Carp, and which negotiations are mentioned in a letter from Messrs Kittson and Hill to Mr. Carp, in January, 1877, the existence of which letter was known to plaintiff. It is indispensable to plaintiff's case that the scheme should have originated with himself; and the alleged agreement, if ever made, must have been made before Messrs Hill and Kittson had opened negotiations with the Dutch committee for the purchase of the bonds, and if not made before then, it never could have been made.

The plaintiff and Fisher accordingly fix the date of Fisher's first communication to Mr. Hill as in the summer of 1876, and the final agreement as in the autumn. And they both of them (and especially Mr. Fisher) fortify their narrative by many details of circumstances, which, while they give it an air of probability, fix the dates beyond possibility of change. These circumstances are

so interwoven with the substance of the narrative itself, that they cannot be removed without leaving the rest of it mere *disjecta membra*. And those circumstances are of such a nature that if this part of the story be not true, no credit can be given to any of the rest.

Under the *third* head the evidence for plaintiff shows that, as the trusted representative of Messrs. J. S. Kennedy & Co., (the American agents of the committee) and the bondholders, he was kept advised of the progress of negotiations by frequent and copious letters, and, in the earlier stages, was made by Messrs. Kennedy & Co. a channel of communication between themselves and Messrs. Kittson and Hill. Plaintiff's documentary evidence shows this, and it shows no more. Nowhere in the great mass of correspondence and other documentary evidence introduced by him is there a scratch of the pen showing the terms of the alleged agreement, or indicating the existence of any such agreement, or giving even a hint that plaintiff was in any way interested with Mr. Kittson and Mr. Hill in any enterprise for acquiring the bonds or property. But correspondence between plaintiff and his employers, withheld by plaintiff but procured and introduced by defendants, shows that he was not interested, and that he had no knowledge of the proceedings of the associates except so far as J. S. Kennedy & Co. informed him as their agent.

GENERAL STATEMENT OF DEFENDANTS' CASE.

On the other hand, the defendants, in their answer and their evidence, (1) deny that the plaintiff had any information not possessed by the defendants; (2) deny the making of any agreement with plaintiff; and (3) deny that the bonds, etc., were bought in the carrying-out of any enterprise to which the plaintiff was a party, or in pursuance of any agreement with him, or that he could or did render any services in the prosecution of the enterprise actually undertaken and achieved. They also say that the pretended agreement, if ever made, was against public policy and illegal, because of plaintiff's position as receiver of one road and general manager for the trustees in possession of the other, and because

contemplating and involving a breach of trust by plaintiff, and a fraud upon the bondholders and the stockholders of the two companies, and upon the circuit court of the United States, whose receiver he was.

In their proofs the defendants further show that their enterprise was not originated by plaintiff or by Fisher. And while the plaintiff shows that the enterprise to which the alleged agreement related (if it ever existed) was an enterprise for buying the bonds *for cash*, so the defendants show that the enterprise in which they originally engaged (but to which the plaintiff was not a party) was an enterprise for buying for cash; and they further show that this enterprise totally failed; and that thereafter a new enterprise was devised, but not by themselves or by plaintiff, into which the defendants were admitted, and which was not contemplated by or undertaken by the plaintiff, and in which plaintiff had not, nor could defendants give him, any part or lot.

Following the order of plaintiff's proofs, the defendants show:

First. That the enterprise in which they first engaged was projected late in the year 1873 by Mr. Donald A. Smith; that, at his request, during the years 1874 and 1875, Messrs. Kittson and Hill fully informed themselves as well as Mr. Smith of all those matters which plaintiff says were within his own peculiar knowledge, but of most of which the plaintiff had already confessed that he was ignorant until after March 13, 1876.

That they were so engaged, and the origin and character of the undertaking, and the steps taken by them and by Mr. Smith during these years, and the nature and sources of the information obtained, they show at length and in detail by the testimony of Mr. Hill, (Mr. Kittson having deceased,) and corroborate that testimony at every point by witnesses of the highest standing and by contemporary documents to which they resorted for much of the information.

They also show that in March, 1876, they were authorized by Mr. Smith to open communication with the Dutch committee, and at once proceeded to do so; and that in the first half of April, 1876, at the city of St. Paul, in personal interviews with John S. Barnes, of the firm of J. S. Kennedy & Co., agents for the Dutch commit-

tee, they endeavored to ascertain whether and at what price the bonds held by the Dutch committee could be purchased.

And they substantiate this by a letter written by Mr. Barnes himself to plaintiff, on June 9, 1876, which the plaintiff himself had introduced and had testified that its subject-matter (not definitely expressed) was something very different. And they explain Mr. Barnes' letter, and conclusively show the subject of their negotiation with him in April, 1876, by an autograph letter of plaintiff himself, (of which he kept no copy and the production of which he did not anticipate,) dated June 3, 1876, and to which Mr. Barnes' letter was an answer.

Before the production of his own letter Mr. Farley (called by defendants) swore positively that Mr. Barnes' letter did not refer and could not refer to any such negotiation. And even when his own letter was shown him and read to him, he swore with the utmost positiveness to the same effect, and that neither letter could have related to any such negotiations, and that he never heard of any such negotiations on the part of Mr. Kittson and Mr. Hill until after the agreement was made, and that the agreement was not made till the autumn of 1876.

It needed, however, only a conference with his counsel and Mr. Fisher, during an adjournment of the examination, to make Mr. Farley come in the next day and take back all he and Fisher had sworn to as to the dates and details and circumstances of the negotiations and agreement, and to swear with equal positiveness that the agreement must have been made as early as April, 1876.

And then the defendants show that the plaintiff is in no better case by fixing the date prior to June 3d, (to say nothing of the hopeless discredit into which he thus brings his own and Fisher's testimony,) unless he can put it before the opening of negotiations by Messrs. Kittson and Hill with Mr. Barnes in the first half of April, which is simply impossible; and that if there is any truth whatever in Farley's and Fisher's original testimony, it was impossible for the agreement to be made at any time even before June 3d.

And even were it possible, it is in the last degree improbable that Messrs. Kittson and Hill, having been more than two years aiding Mr. Kittson's old and intimate friend Mr. Smith in his enter-

prise, and after that enterprise had reached the point that negotiations could be and were begun with the Dutch committee—it is incredible that just at that time they should abandon Mr. Smith—throw him over—make a new alliance with Mr. Farley into which Mr. Smith was to be admitted on the best terms that could be exacted from him; and all this when Mr. Farley could be of no use, while Mr. Smith, as the man who could raise the money, *was the one indispensable man in the whole party.*

Fisher, also, called in rebuttal (of his own and Mr. Farley's evidence), takes back all he had sworn to in his original testimony, and says he is satisfied the agreement was made between March 13, 1876, when plaintiff took possession of the First Div. lines as general manager for the company, and June 3, 1876, the date of his letter.

Neither plaintiff nor Fisher pretends that the letter in any way refers to the agreement, or that it in any way refreshes or changes his "recollection" as to the dates and circumstances attending the agreement. And the defendants say that upon the whole evidence it is plain that in their story of the agreement and the negotiations, and the dates and circumstances attending and inextricably interwoven with the fabric of the narrative, the plaintiff and Fisher first fixed the dates because no other dates would agree with these two facts, which could not be contradicted, viz., (1) that plaintiff got all his knowledge about the First Div. Co.'s property and its bonds and their prices after he became general manager; and (2) that as early as December, 1876, Mr. Kittson and Mr. Hill were in negotiation, in St. Paul, with Mr. Carp, of the Dutch committee. And that to accord with these dates, and, by means of details of conversation, to give plausibility and an appearance of clear recollection to their testimony, they invented and swore to things as said in the negotiations and interviews which (for all that they knew) might well have been said then, if said at all, but which could not possibly have been said prior to June 3, 1876, and which (in view of the evidence for defendants that the project was originated by Donald Smith late in 1873, and was *his* project, and that he and Messrs. Kittson and Hill had been engaged upon it from that time down to

the conference with Barnes in April, 1876,) could never have been said at all.

Second. The defendants show what was done by Messrs. Smith, Stephen, Kittson and Hill, in carrying out their enterprise, from the time of the alleged agreement (whether made in the autumn or in the spring of 1876) down to the acquisition of the last piece of property bought, in June, 1879. And they show what was done and what was *not* done by plaintiff, what he knew and what he did not know about the negotiations, and to what sources he resorted for information.

They show that neither Mr. Smith nor Mr. Stephen was at any time aware that plaintiff was associated in the enterprise, either with themselves or in any sub-partnership with Messrs. Kittson and Hill, and that this same ignorance prevailed among all concerned in carrying out the enterprise.

And it is to be noted that plaintiff has not produced a single witness—beyond himself and his assistant—who ever heard anything from any one connected with the enterprise—or who ever heard from Mr. Farley himself prior to June, 1879,—any statement, intimation, or hint that he was in any way interested in it.

They show that while the agreement in question here was wholly oral, yet when they and Messrs. Smith and Stephen came to a point where any obligations were assumed, they put their agreement into writing, and soon afterwards made a more elaborate agreement, in which their respective rights and obligations, as they then existed and as they might be affected by future contingencies, were carefully specified. And this difference is the more noticeable because of the close and long-subsisting intimacy and mutual respect subsisting between Mr. Stephen and Mr. Smith, Mr. Smith and Mr. Kittson, and Mr. Kittson and Mr. Hill. And they show that these agreements contain provisions entirely incompatible with any interest of plaintiff in the enterprise, and disclose an enterprise wholly different from that to which he says he agreed with Mr. Hill and Mr. Kittson; an enterprise in which all four gentlemen were to be jointly liable for all moneys to be raised and all obligations to be assumed, and were to join in furnishing collateral securities, all which they did. Whereas the plaintiff has sworn that in his

agreement with Kittson and Hill, no one of the three "would be required to raise or furnish any funds for the enterprise."

They show that throughout all the transactions Messrs. Kittson and Hill, as well as Messrs. Smith and Stephen, dealt with plaintiff, and plaintiff dealt with them, not as an associate, but merely as receiver and general manager, as agent for J. S. Kennedy & Co., and representing the bondholders. That when the plaintiff wished information as to the progress of the negotiations or plans of the associates, in addition to what J. S. Kennedy & Co. had already given him, he applied for it, *not* to Mr. Kittson or to Mr. Hill, but to Messrs. J. S. Kennedy & Co., and this although Mr. Hill was here on the spot, in St. Paul. And that whenever the associates wished any course of action to be taken by Mr. Farley, they applied *not* to him, but to Messrs. J. S. Kennedy & Co., to make the request and see that it was complied with.

They show that as soon as it appeared likely that the Dutch committee would look favorably on a proposition for sale of the bonds, and before this was generally known, plaintiff, to make money by the probable advance, made large purchases in Holland on his private account, both of outstanding bonds and of certificates representing bonds held by the committee, and that these last he actually sold at a large profit, through Messrs. J. S. Kennedy & Co., to the four associates.

And aside from the bearing of this on the question of fact whether these parties made an agreement for a common enterprise, we submit that if the agreement was of such a nature that it did not preclude plaintiff's right to buy on his own sole account, or jointly with a stranger, bonds and certificates to the amount of $50,000, it did not preclude defendants' right to buy, in concert with Messrs. Stephen and Smith, and without joining plaintiff, bonds to the amount of $25,000,000.

They show that the policy of the associates in dealing with the outstanding bondholders, and the stockholders, was to use their great majority of the bonds to depress the market in Amsterdam, thus enabling them to recoup from the outstanding bondholders the amount they expected to pay and did pay for the stock. This was perfectly legitimate, as they dealt with the other bondholders at

arms' length. But if plaintiff was an associate, and especially if, as he says, he directed the policy of the associates, then such conduct on his part was a gross fraud alike on the bondholders and the stockholders.

They show that besides his general obligation of fidelity and candor toward the court which made him receiver, Mr. Farley was more than once placed in a position where he was in effect specially charged by the court to disclose if he had any interest with the associates—as much so as if the question had been expressly and solemnly put to him—and that by his silence he, in effect, represented that he had not.

They show that in January, 1878, when the purchase of the Dutch committee's holding seemed to be assured, plaintiff was casually asked if he would like to take a small interest in it, and he declined for want of money. And that as late as April, 1878, more than a month after the purchase had been concluded, he sought Mr. Kennedy's advice as to obtaining a renewal of the opportunity, if practicable, and, for the same reason, concluded not to do so.

They concede that it was the intention of the associates, in case plaintiff, in his position as receiver, co-operated faithfully with them in the work (so much for the benefit of all the bondholders, of the public, and of the court) of finishing the Extension lines, to reward him with a "bonification," (as Mr. Stephen calls it,) and perhaps make him a director, and that they caused this purpose to be made known to him by Mr. Kennedy; and that plaintiff's own conduct precluded him from receiving the "bonification," while the situation and their experience of his peculiar characteristics rendered the directorship out of the question

They show that late in May, 1879, (after the organization of the Manitoba Co.,) the plaintiff, in writing to Mr. Barnes, states as his grievance, "the election of Bigelow & Galusha as Directors in the New Company, Men of no Money, railroad experience or Influences, And myself left out in the *cold*," and threatens to "try and get even with Jim Hill before I leave here." That so late as May 29, 1879, in writing to Mr. Kennedy, to whom, he says, "I looked to see me righted," he states as his grievance Mr. Hill's persistence in "his Present course to ignore all my claims to Share in the honours or

profit to some small degree," and again threatens Mr. Hill. And not till after this did he make any claim of an interest as an associate.

It is true (and the defendants admit it) that plaintiff, by reason of his relations with the bondholders and Messrs Kennedy & Co., was informed by them of much that was done by the associates.

So far as plaintiff in his pleadings or in his own or Fisher's testimony shows that he had any knowledge of the dealings of the four associates among themselves or with Kennedy & Co., or the committee, that information is proved to have been given him (more than once in answer to his own direct inquiries) by Kennedy & Co. or Carp., usually by letter or telegram. When he or Fisher go beyond the information thus obtained, their testimony is shown to be untrue. And where plaintiff's sources of information on these subjects (and among them were certain newspaper articles) were themselves incorrect or were misunderstood by plaintiff, his and Fisher's testimony, based on such information, is demonstrated to be untrue.

Thus, on February 12, 1878, when the bargain made with the committee was under consideration by its constituents, a St. Paul newspaper published a leading article stating that the purchase had been finally closed. Plaintiff was then in Dubuque. He returned to St. Paul on the 14th, read the article, and (although Mr. Hill was in St. Paul) he wrote to Kennedy & Co. for information as to the terms of the bargain, and, on receiving their reply, wrote again for fuller particulars. On Feby. 18th, Kennedy & Co., (assuming that the publication proceeded from Mr. Hill and not knowing that it was necessary, and not having received Mr. Hill's letter of Feby. 21st, showing its necessity,) write plaintiff complaining of the publication as premature and likely to be prejudicial. Plaintiff put in evidence Kennedy & Co's letter, and he and Fisher give a minute and circumstantial account (suggested by and made to fit the letter) of a conversation with Mr. Kittson, in which he angrily complains of Mr. Hill's indiscretion. But the publication was a necessary and proper one, as plaintiff would have known had he been an associate. And it is proved that at the time of the pretended conversation Mr. Kittson had already been in New Orleans a month and did not re-

turn till a month later. After this proof plaintiff tries to attach the conversation to a publication made four months earlier. But it had been so carefully adjusted to the later date that it would not fit any other.

And two letters of Kennedy & Co., of January 30, and Feby. 15, 1879, suggest a conversation to which plaintiff and Fisher both swear, in which Mr. Kittson begged plaintiff to go to New York to take charge of a negotiation with Litchfield for the purchase of the stock. But it is proved conclusively that prior to the first of these dates the negotiation had been ended and the bargain made by Mr. Stephen, (who had the matter in his sole charge,) and that this was known to Mr. Hill, and must have been known to Mr. Kittson had he been in St. Paul.

In these and numerous instances(as where plaintiff and Fisher swear to dissuading Mr. Hill from sending a man to Holland to buy bonds in the open market) the contemporary records and documents which do not lie, and the testimony of well informed and credible witnesses which cannot be gainsaid, combine to expose the testimony of plaintiff (and of Fisher, who never fails to corroborate him) as mere fabrications, not the products of mistaken recollection but inventions for a purpose; and we are also enabled to show just what suggested the story, and to expose the process of manufacture.

COMPARISON OF PLAINTIFF'S TWO SUITS.

As plaintiff, in the very outset of this case, brands as untrue the statements as to the terms of the agreement which he had made and sworn to in a former suit against these defendants, we set side by side those parts of his first complaint and his present bill, by which he discredits in advance his case and his own testimony.

The complaint in the state court was verified by plaintiff's oath, June 13, 1879. The original bill in this cause was filed Nov. 13, 1880, and the amended bill Dec. 15, 1881.

COMPLAINT IN STATE COURT

Sworn to June 13, 1879.

[*Defendants' Exhibit* No. 164, p. 1569.]

The said plaintiff, *a citizen of the state of Minnesota*, for complaint against the said defendants respectfully shows, etc.

That in the summer of 1876 he and the said defendants N. W. Kittson and J. J. Hill mutually agreed by and between themselves each with the other, that they would jointly undertake, for their joint mutual and equal interest, benefit, advantage, and profit, [the purchase of bonds] of The First Division of the Saint Paul & Pacific Railroad Company and of the Saint Paul & Pacific Railroad Company, corporations created and existing under the laws of this state, which bonds had been issued by said respective companies, and were outstanding and for sale by the holders thereof, and were secured by mortgage upon the lines of road and other property of said companies, and which mortgages were then in process of foreclosure by suits in courts in this state for default in the payment of the interest of said bonds.

BILL IN CIRCUIT COURT.

Your orator, Jesse P. Farley, of Dubuque, Iowa, and who is *a citizen of the state of Iowa*, brings this bill, etc.

That in the summer of 1876 he and the said defendants Norman W. Kittson and James J. Hill mutually agreed by and between themselves each with the other that they would jointly undertake for their joint, mutual and equal, benefit advantage and profit [to acquire by purchase or contract all the bonds possible to be obtained] of the First Division of the St. Paul & Pacific Railroad Company and of the St. Paul & Pacific Railroad Company, corporations created and existing under the laws of the state of Minnesota, and owning lines of railroad and other property in said state, which bonds had theretofore been issued by said respective companies, and were outstanding and for sale by the owners thereof [at a large discount,] and were secured by mortgages upon the lines of road and other property of said companies, and which mortgages were then in process of foreclosure in [five several] suits in courts in said state for default in the payment of interest upon said bonds.

That said defendant Kittson represented that he could procure one Donald A. Smith to advance and furnish *by way of a loan* the necessary funds that would be required in said undertaking; and it was agreed and understood between the plaintiff and said Hill and Kittson *that neither of them would be required to raise or furnish any funds in said enterprise*, but that the same could be procured from or through the said Smith.

And it was further agreed by and between the plaintiff and said Kittson and Hill that the said Kittson might use or give to the said Smith or other furnishing the desired funds *a two-fifths or 40 per cent. interest in said purchase to be made*, should it become necessary to do so in borrowing or procuring the necessary funds to carry out said enterprise; but that three-fifths or 60 per cent interest in said enterprise and undertaking should be reserved for the plaintiff and said Hill and Kittson—that is to

That the understanding, object, purpose, and agreement of said parties in acquiring said bonds was to become the purchasers of said lines of railroad and other mortgaged property, when offered for sale under decrees for the foreclosure of said mortgages, and to turn in and use said bonds in payment or part-payment therefor, and thereby, through and by means of said bonds, acquire said lines of railroad and property.

That the said defendant Kittson represented that he could procure from one Donald A. Smith, and other capitalists in Canada the necessary funds that would be required in said undertaking.

And it was further agreed by and between your orator and said Kittson and Hill that, if it should become necessary to do so, the said Kittson might use or give to said Smith and others furnishing the required funds, *an interest with them in said purchase*;

but that the interest not so used or given should be retained and held for the mutual, joint, and equal benefit of your orator and the said Kittson and Hill.

say, one-fifth or 20 per cent for each—for their mutual and equal advantage, profit and protection.

And plaintiff further alleges that, subject to the foregoing understanding and agreement, it was then and there also concluded and agreed by and between the plaintiff and the said Hill and Kittson that the details of the negotiation for the procuring of the necessary funds and for the purchase of the said bonds should be principally conducted and managed by the said defendants Hill and Kittson and such person or persons as *a minority* interest in said enterprise might be given to in procuring the necessary funds therefor, and that plaintiff should render such aid or assistance therein as should be required of him, and he be able to give.

It was also then and there further agreed by and between your orator and said Kittson and Hill that the details of the negotiations for procuring the neccessary funds and for the purchase of said bonds should be principally conducted and managed by the said Kittson and Hill and such person or persons as an interest in said enterprise should be given to for furnishing funds therefor; and that your orator should *furnish such facts, information and advice*, and render such aid and assistance *therein, from time to time*, as should be required of him.

That your orator had knowledge not possessed by any of the other parties as to the whereabouts and situation of said bonds, the rated value thereof by the holders, the mode whereby and the channel through which the same could be reached and procured; also in respect to the situation, amount, character, and value of the lines of railroad and property mortgaged to secure said bonds, and in respect to the pending suits for the foreclosure of said mortgages; and that the services of your orator in respect to all of said matters, and his co-operation, were indispensable to the success of said enterprise.

And plaintiff further alleges that thereupon the said defendant Kittson made arrangements with and procured the said Donald A. Smith, in conjunction with one George Stephens, to agree to furnish and advance the funds necessary to purchase the said bonds and carry out said enterprise; and, as plaintiff is informed and believes, the said Kittson, by and with the consent of the defendant Hill, *but without the knowledge or consent of plaintiff, and in violation of the understanding and agreement in respect thereto before mentioned*, agreed with the said Smith and Stephens that they, the said Smith and Stephens, should have and hold *for their own use and benefit, a three-fifths or 60 per cent. interest* in said undertaking and enterprise, leaving only two-fifths or 40 per cent. interest for this plaintiff and said Kittson and Hill.

And the plaintiff further alleges that thereupon, and in 1877, active negotiations were opened and carried on by the said Smith and Stephens, aided by said Hill, Kittson, and plaintiff, for the purchase of said bonds in pursuance of said understanding and agreement appertaining to said enterprise, and that, as a result thereof, in the month of February, 1878, they purchased a large quantity of said bonds, amounting in the aggregate to over $19,000,000, and since that time have pur-

And your orator further alleges that thereupon the said defendant Kittson made arrangements with and procured the said Donald A. Smith, in conjunction with one George Stevens, *to join* in said enterprise, and furnish funds to purchase or secure the control or use of said bonds, as far as found practicable, and to carry out said undertaking; and, in consideration thereof, agreed to give the said Smith and Stevens a certain fractional interest in said enterprise; but of the precise terms of the agreement with them as to the interest they were to have in said enterprise, your orator is not definitely advised, but on information and belief alleges the same to be *one-half*; the balance, however, not so agreed to be given to the said Smith and Stevens, belonged to your orator and the said Kittson and Hill, in equal proportions under the said agreement between them.

And your orator further alleges that thereupon, and in 1877, active negotiations were opened and carried on by the said Smith, Stevens, Kittson, Hill, and your orator, for the purchase of said bonds in pursuance of the aforesaid understandings and agreements appertaining to said enterprise, and were continued down into the month of June, 1879, and as a result thereof they purchased and secured a large quantity of said bonds, amounting, in the aggregate, at their face value and

chased many more, but the exact quantity the plaintiff is unable to state; but the aggregate of all purchased amounts to about $20,000,000.

overdue interest, to over $25,000,000.

That said purchases were made by and in the name of said Smith, Stevens, Kittson, and Hill, but for the purpose and with a view to their use in the purchase of said lines of railroad and other mortgaged property when offered for sale under foreclosure decrees, and under and in pursuance of the agreements and understandings between your orator and the said Kittson and Hill hereinbefore stated in respect thereto.

That throughout said negotiations for the purchase of said bonds, and in the purchase thereof, your orator was continually called upon by the said Kittson and Hill for facts and information, advice, and co-operation, in respect thereto, and at their request furnished and rendered the same pursuant to the aforesaid agreements and understandings between them; and that said negotiations were only successful through and by means of the advice and co-operation of your orator and the facts and information peculiarly within his knowledge as aforesaid, and imparted by him to the said Kittson and Hill, at their request, under said understandings and agreements between them as aforesaid.

In comparing these pleadings, it will be seen that the first complaint contains a needless and untrue statement that the plaintiff is a citizen of Minnesota. Judge Dillon, who made Farley receiver, was then presiding in the circuit court, and he did not dare to come before the judge who had trusted him with a suit founded on a betrayal of the trust. This averment was evidently inserted to deter defendants from removing the cause to that court.

In the first complaint he swears that it was a term of the agreement that *no more than two-fifths* might be given Mr. Smith, and that in allotting three-fifths to Mr. Smith and Mr. Stephens, Messrs. Kittson and Hill acted without his knowledge and consent. To this complaint the defendants demurred, pointing out in their argument that in the absence of a showing that Messrs. Smith and Stephens could be enlisted in the enterprise for two-fifths, the defendants had not broken the agreement; and that the enterprise so engaged in by the four gentleman was not the enterprise contemplated by the agreement, and therefore plaintiff could claim no interest in the bonds. The supreme court sustained these views in an opinion which forms part of Defts'. Ex. 165, p. 1579. And see *Farley* v. *Kittson*, 27 Minn. 102. In that opinion the court pointed out quite clearly what sort of an agreement would sustain the suit, and thereupon, to conform to the decision, the plaintiff makes the new averments in his amended bill, in effect stating that his former sworn complaint was false.

Called in rebuttal, the plaintiff offered no explanation of this; but after his deposition was closed his counsel offered (what was clearly incompetent) plaintiff's own affidavit on an unsuccessful motion (after the decision of the supreme court) for leave to amend his complaint, which was denied.

It this affidavit (Plff's Ex. 243, p. 1735,) the plaintiff denies on oath his former complaint, saying: "There was no agreement or understanding that no more [than two-fifths] should be given in case it should be found necessary to do so."

In his former complaint he says and swears, without qualification, that Messrs. Kittson and Hill "agreed with the said Smith and Stephens that they, the said Smith and Stephens, should have and

hold *for their own use and benefit* a three-fifths or 60 per cent interest."

In the affidavit he says: "That he does not now know certainly what interest in said enterprise was agreed to be given to said Smith and Stevens. That he has lately been informed that said Hill & Kittson claim a half interest in said enterprise, leaving a half interest for said Smith and Stevens."

And in his bill of complaint he says he is not definitely advised as to the interest "the said Smith and Stevens" were to have, "but on information and belief alleges the same to be one-half."

Now as early as September, 1877, there was a general understanding between the four associates that in whatever part Mr. Stephen should not be required to use in obtaining the money (and it was supposed that one fifth would probably be enough for that purpose) the four should be equally interested. (Hill, 613, Q. 268; Smith 1148, Q. 97; Stephen, 1236, Q. 71, 72.)

In January, 1878, and again in March, 1878, by agreement in writing, one-fifth was placed in Mr. Stephen's hands for use, if necessary, in raising money, and the four were declared to be equally interested in the remaining four-fifths, and in whatever part of the one-fifth Mr. Stephen might not be required to use. (Defts.' Ex. 14, p. 916; Ex. 118, p. 1269.)

So it appears that every one of plaintiff's statements as to the interest agreed to be given Mr. Smith and Mr. Stephen is erroneous in point of fact.

But if plaintiff were an associate with Smith and Stephen, (and his bill certainly says that he was,) or even if he were merely an associate with Kittson and Hill, how could it happen that he should remain totally ignorant of the amount of his interest down to the winter of 1880, when he brought this suit? He nowhere alleges or testifies that he was ever misinformed by the associates, or that they ever refused information, or, indeed, that he ever asked for any.

Plaintiff was not a man to go without information from Messrs. Kittson and Hill, simply for want of asking. He was not a man to remain willingly in ignorance of matters affecting his own interests. And but one reason can be given why he was not informed—

why he did not attempt to ascertain the extent of his interest,—and that is, that he had no interest.

There is no way to account for his ignorance of the agreements between the associates and the mis-statement in his original complaint, except by the facts (1) that he had no interest in them and no occasion to inquire, and (2) that Messrs. J. S. Kennedy & Co., were not acquainted with the agreements, or with the division of interests therein made, and couldn't have told him, even if he had inquired; (Kennedy, 1603, C. Q. 15, 16;) and (3) that his statement that but two-fifths were to go to Smith and Stephen had its origin in an inaccurate newspaper article, published in October, 1877, which he has himself introduced (1435).

These pleadings plainly show:

1. That all persons engaged or to engage in the enterprise were to be associates, each with the others. Plaintiff was not to be a subassociate or subpartner with Messrs. Kittson and Hill, but an associate with Mr. Smith and Mr. Stephen.

2. The enterprise to be undertaken was a purchase of the bonds for cash, as a step in the acquisition of the mortgaged property.

3. The consideration to be furnished was as follows:

Neither of the parties to the agreement was to furnish or raise any money. The first complaint expressly states that "it was agreed that neither of them would be required to raise or furnish any funds in said enterprise." And the same is implied in the bill and in the plaintiff's evidence in this cause. "I had no money to raise—didn't propose to," (1418, Q. 299.)

4. Messrs. Kittson and Hill were to procure Messrs. Smith and Stephen to furnish the needed money, and, with them, to conduct the negotiations for the purchase of the bonds. This is all they were to do.

5. The plaintiff was to "furnish such facts, information, and advice, and render such aid and assistance therein," (i. e. in the negotiations for buying the bonds) "as should be required of him," —whether compatible or not with his duties as receiver, general manager for the trustees in possession, and trusted servant of the bondholders.

But so late as February, 1878, after the four associates had

made a binding offer for the bonds, involving heavy personal obligations, the plaintiff did not consider that he was bound by any engagement with them from which he was not at liberty to withdraw. And the evidence introduced by plaintiff (even if true) entirely fails to show that any of the parties *was bound* to undertake any enterprise for the purchase of the bonds.

In the plaintiff's evidence as to the agreement, while he plainly shows that, if made at all, it was for an enterprise for a *cash* purchase of the bonds in which none of the parties was to incur any pecuniary liability, he shows also, if his evidence is to be believed, that his contribution to the enterprise, what he was to do to earn his share, was as follows:

1. He was to furnish his knowledge and judgment as to the prices that should be paid for the bonds.

2. He was to advise his associates in what manner they could reach the Dutch committee, and use his influence with the committee to secure a favorable consideration for their proposals.

3. He was to advise them how to reorganize a new company on the wreck of the old ones, and to issue new mortgage bonds to raise money to repay the cost of the bonds.

4. He was to manage the railroads after they should be acquired.

And this information and advice, in matters of negotiation, finance, and administration, were to be furnished to an association numbering among its active members the head of the largest financial institution in America, and the chief manager of the oldest and the largest trading company in the world. And in exchange for them, these associates were to yield to one who furnished no money and incurred no risk, an one-fifth interest in the enterprise, according to the original expectation of the parties.

The efforts of the defendants to find out from the plaintiff what services he did in fact render, and the meagre results of those efforts, appear in pp. 1415-8, Q. 289-300; and see pp. 1425-1433, C. Q. 1-13.

THE EVIDENCE IN THE CASE.

Following the order already pointed out, we shall take up, in their order :

1. The evidence showing the condition of the affairs of the companies and their relations with the bondholders, and plaintiff's relations to the property and the bondholders, down to March 13, 1876, when he became general manager of the First Div. lines *for the company*, and down to October 9, 1876, when he became such general manager for *the trustees in possession.*

2. Plaintiff's and Fisher's testimony as to the alleged agreement, its origin, and the negotiations that led to it.

3. The evidence for defendants showing the project originated by Donald A. Smith, and what was done by him, and by Messrs. Kittson and Hill in the furtherance of it, from late in the year 1873 down to August, 1876.

4. The plaintiff's forced abandonment of his own and Fisher's original story.

5. A history of the enterprise of Messrs. Smith, Stephen, Kittson and Hill from the summer of 1876 until its successful termination.

And after thus disposing of the issues of fact, we shall proceed to a discussion of the questions of law in the case.

FIRST.

THE TWO COMPANIES, THEIR PROPERTY AND INDEBTEDNESS, ETC., AND PLAINTIFF'S RELATION TO THEM DOWN TO MARCH 13, 1876, WHEN HE BECAME GENERAL MANAGER OF THE FIRST DIV. LINES FOR THE COMPANY, AND DOWN TO OCTOBER 9, 1876, WHEN HE BECAME GENERAL MANAGER FOR THE TRUSTEES IN POSSESSION.

And herein will of course appear just what opportunities plaintiff had for acquiring information that were not open to the general public.

The lines of railroad of the two companies upon which the mortgage bonds were secured formed one system of roads, and belonged originally to the St. Paul & Pacific Co., and were afterwards (in 1864) divided in ownership between that company and

a different and independent corporation, carved out of the former pursuant to peculiar provisions in its charter, and bearing the corporate name of the First Division of the St. Paul & Pacific Railroad Co.

The lines of the First Division Co. consisted of (1) a line from St. Paul via St. Anthony, (now East Minneapolis,) to Sauk Rapids, (or Watab) a distance of 76 miles, known as its "Branch line;" and (2) a line from St. Anthony to Breckenridge, a distance of 207 miles, and known as its "Main line."

The lines of the St. Paul & Pacific Co. were extensions of the Branch line of the First Div. Co., and were commonly designated together as the "Extension lines," or "Extensions." They were two in number, viz.: (1) a line running north from Sauk Rapids, (or Watab,) the northerly terminus of the Branch line, to Brainerd, a point on the Northern Pacific railroad, a distance of about 60 miles, and often called the "Brainerd branch," as well as the "Brainerd extension;" and (2) a line beginning at East St. Cloud, (a point on the Branch line near Sauk Rapids,) and running in a northwesterly direction via Melrose, Sauk Centre, Alexandria and Fergus Falls to a point 12 miles south of Glyndon (known as Barnesville or Barnes) and thence running northerly down the valley of the Red River to St. Vincent or Pembina, on the boundary line between Minnesota and Manitoba, crossing, on its way, the Northern Pacific road at Glyndon. The total length of this line was about 310 miles and it was sometimes called the "St. Vincent branch," but was more commonly known as the "St. Vincent Extension."

The lines of both companies were endowed by act of congress of March 3, 1857, with a land grant of six sections per mile, which was increased to ten sections by the act of March 3, 1865.

In 1873 the lines of the First Div. Co.—both Main and Branch —had been for some years completed and in operation.

The Extension lines were not completed. In April, 1871, the First Div. Co. contracted to build them out of the proceeds of a $15,000,000 issue of mortgage bonds; and received from the St. Paul & Pacific Co. a perpetual lease. The work of constructing the lines was committed to De Graff & Co., as contractors. By

the fall of 1872, when the work of construction stopped, they had graded the Brainerd branch, and laid 3 or 4 miles of iron at the northerly end. On the St. Vincent Extension, they had graded and laid the iron from St. Cloud to Melrose, a distance of about 35 miles. And from Glyndon they had laid iron 12 miles southwardly to Barnes, and 92 miles northwardly, to a point beyond Crookston, a continuous distance of 104 miles.

Between Melrose and Barnes, and beyond the end of the iron north of Crookston, the road-bed had been mostly graded, ready for the iron.

All the lines are shown and their condition indicated on the annexed map.

The mortgages on the First Div. lines, as stated in the answer (24-7,) are shown in the stipulated abstract of Defts' Ex. 133-8, pp. 1790, *et seq.* Two earlier mortgages are shown in the stipulation, Defts.' Ex. 167, p. 1587. Printed copies of them are in a volume printed in 1873, and produced in evidence by defendants the title page and table of contents only being copied into the record. (825.)

The $15,000,000 mortgage on the Extension lines is an exhibit to the bill in the Kennedy suit in which plaintiff was appointed receiver, and is part of Defts' Ex. 5, pp. 837, 881.

By the terms of each of the $1,200,000 and $2,800,000 mortgages on the Branch line, and of the $3,000,000 and $6,000,000 mortgage on the Main line, the bonds secured by each mortgage were receivable at par as cash in payment for the lands comprised in the land grant on which such mortgage was a first lien.

The bonds of the $15,000,000, the $3,000,000 and $6,000,000 and $1,200,000 issues, and such as were used of the $2,800,000 issue, were negotiated in Holland, except that a few of the $1,200,000 issue were sold to and held by persons in this country.

The stoppage of work on the Extension lines in October, 1872, was due to failure to make payments to De Graff & Co., the contractors, and the lines remained in this unfinished condition until 1878.

In the spring of 1873 the First Div. Co. defaulted in payment of the interest coupons then falling due on the bonds secured by the

$1,200,000, $2,800,000, $3,000,000 and $6,000,000 mortgages, and never afterwards resumed payment.

Of the proceeds of the $15,000,000 issue of bonds, 20 per cent. was reserved to pay interest until the roads should earn it, and hence no default was made in the interest on these bonds until January 1, 1875. Of this $15,000,000 issue, about $11,000,000 had been sold at varying rates of discount, and about $4,000,000 were held by Lippmann, Rosenthal & Co., bankers at Amsterdam, (and the financial agents of the First Div. Co.,) under a claim of lien for advances to the amount of about $900,000, made by them to the First Div. Co. The entire proceeds of the bonds sold (except the 20 per cent. reserved to pay interest) had been consumed, the lines were unfinished, and by the terms of the act of congress making the land grant, the right to earn it by completing the lines would expire on December 1, 1873.

In this condition of things, a meeting of the bondholders of all five issues was called and held at Amsterdam on June 20, 1873, for organization for mutual protection, and at that meeting a committee was appointed with whom a majority of the holders of each issue of bonds deposited their bonds, receiving for each bond so deposited a certificate of the same number as the bond. The constitution and powers of the committee are set forth in Exhibit H. to the deposition of Johan Carp, a member of it, taken for plaintiff. (546.)

This committee, known as the "Dutch Committee," at once took steps to enforce the rights and protect the interests of the bondholders. And as a first step they appointed the firm of J. S. Kennedy & Co., of New York, (then composed of John S. Kennedy, Henry M. Baker, and John S. Barnes.) their agents in this country.

Messrs. Kennedy & Co. at once employed counsel, and filed a bill in the circuit court for Minnesota for an account of the moneys realized and expended by the First Div. Co. from the $15,000,000 issue of bonds; for a receiver for that company and for the St. Paul & Pacific Co.; for an order that the receiver complete the extension lines with funds which it was represented would be furnished by the Dutch bondholders on security of receiver's deben-

tures, of which the court was asked to direct the issuance; and for foreclosure of the $15,000,000 mortgage, and for a sale of the extension lines under that mortgage. (Deft.'s ex. 5, pp. 840, 859.)

(Why the amended bill in this cause should falsely state—page 8—that the Kennedy suit "was not a suit for the foreclosure of any mortgage," is not explained by plaintiff.)

The bill was filed early in July, 1873, and on July 10th an order was made by Judge Dillon, requiring the defendants to show cause before him at Davenport, on July 29th, why a receiver should not be appointed, etc.

The order to show cause, bill of complaint and exhibits and affidavits, constitute the Defendants' Exhibit 5. The order to show cause is at page 838, the bill on pages 840, etc.

Upon a hearing, the court on August 1, 1873, made the desired order for a receiver for the St. Paul & Pacific Co., but not for the First Div. Co. (Deft.'s ex. 155, p. 1543.)

On September 1, 1873, a further order was made, modifying some of the provisions of the original order. (Defts.' ex. 156, p. 1549.)

The receiver thus appointed was Mr. Jesse P. Farley, the plaintiff in this suit.

From his own account of his previous history, it appears that he was a retail and wholesale merchant until 1853, when he began his connection with railroads as president of a line in Iowa, and was next superintendent of the same road, and then division superintendent, and was receiver and afterwards president of another line. (50-1, Q. 4-8.)

He qualified by taking the oath and giving the bond required by the order, and came to Minnesota from his home at Dubuque, and entered on the duties of his receivership. Of the $5,000,000 expected to be furnished by the Dutch bondholders to complete the lines, the receiver obtained and issued his debentures for $100,000 only. With this money he put the finishing touches on the 35 miles from St. Cloud to Melrose, and the 104 miles from Barnes (12 miles south of Glyndon) to the end of the iron north of Crookston, so as to earn the land grant for those portions of the line, and took the proper steps to secure the lands.

He brought with him from Dubuque one Wm. H. Fisher, who had long been employed by him, to act as his assistant and amanuensis. (63, Q. 45.)

The receiver did little or nothing in the way of operating the lines during 1873 or 1874. The line from St. Cloud to Melrose was operated by the First Div. Co.; the 104 miles in the Red River Valley were not operated at all until about Oct. 1, 1874, when he began running a single train (hiring the locomotive and cars from the Northern Pacific Co.) from Glyndon to Crookston, (65 miles,) carrying freight and passengers for the steamboats of the Red River Transportation Co., and in November this train was laid up for the winter. (Farley, 132, C. Q. 57. Plff.'s Ex. 25, 26; pp. 200-1.)

And at the December term, 1874, a motion was made by the company for a discharge of the receiver, for the reason that there was no occasion longer to retain him. On Dec. 19th this motion was denied, provided, and it was ordered, that the receiver's compensation should be paid by the plaintiffs, J. S. Kennedy & Co. (Defts.' Ex. 158, p. 1551; Plff's. Ex. 27, p. 202.)

During the next year (1875) the same state of things continued. From June to September the train was run from Glyndon to Crookston. The water in the Red Lake River being then too low to allow the steamboats to reach Crookston, the receiver built a spur track, 9 miles long, from Crookston to a point on the Red Lake river, which he named "Fisher's Landing." The iron and ties for this spur were taken from the track north of Crookston, and the steamboat company furnished the money to pay for the work of construction.

The receiver did this to create and hold business which would enable him "to make this property self-sustaining, and it can be done in no other way." (Plff's Ex. 35 p. 210.) The business of this line in 1875 showed Gross Earnings, $24,240.58; Operating expenses, $16,191.65; Net Earnings, $8,046.93. (Plff's Ex. 39, p. 215.)

Which, with the rental of the Melrose line, "would be about equal to the interest of receiver's debentures," the bondholders paying out of their own pockets the receiver's salary. (Letter Farley to Carp, Jan. 16, 1875. Plff's Ex. 29, p. 205. And see 1405, Q. 241.

Down to March 13, 1876, the receiver was also engaged in controversies with the Northern Pacific Co., and with DeGraff & Co., as to iron rails and other property claimed by him, these matters being attended to by his attorney, Mr. Heard. He seems also to have taken quite an active part in opposing legislation looking to a speedy completion of the Extension lines, but deemed by him and his employers to be prejudicial to the interests and to the rights of the Dutch bondholders.

From this sketch of plaintiff's doings in his receivership down to March 13, 1876, (which has been compiled from his own and Fisher's testimony and 40 of his own letters, introduced by him as Exhibits Nos. 1-40,) it is quite evident that whatever his abilities as a railroad manager, (and he testifies elsewhere in the case that they had made him a reputation "as a railroad man in Iowa,") he had no opportunity to manifest them in Minnesota, nor is there any evidence that his Iowa reputation, whatever it may have been, had extended to or was known in St. Paul.

During this period the Dutch bondholders, through J. S. Kennedy & Co., had made vigorous but unsuccessful efforts to obtain a receivership for the First Div. Co. To this course they were also urged by plaintiff, (Plff's. Ex. 14, p. 191;) who seems to have been not unwilling that "the lot should fall upon me." (Plff's. Ex. 19, p. 194.)

Having failed in their application to Judge Dillon, in July, 1873, for a receivership for the First Div. Co., the next effort to that end was made in a state court—the court of common pleas of Ramsey county. The trustees of the $1,200,000 Branch line mortgage, and of the $3,000,000 Main line mortgage, brought suits in that court, in May, 1874, to foreclose those mortgages, and in June applied for a receiver. Voluminous affidavits were submitted on both sides, and Mr. Farley himself made an affidavit as to the condition of the Main and Branch lines. (Defts.' Ex. 134, p. 1793.)

The application for a receiver was denied. An appeal was taken to the supreme court and was argued at the October term, 1874, but (for reasons hereafter adverted to) had not been determined by that court in March, 1876, nor, indeed, in July, 1876. (Barnes to Farley, July 25, 1876; Plff's. Ex. 94, p. 257.)

Plaintiff knew very little about what was going on in the First Division foreclosure suits. He says: "I never had any business with the foreclosure suits. * * * It is something I seldom trouble my head about." (107, Q. 272; 128, C. Q. 36-7.)

While he had learned of the mortgage indebtedness on the Extension line, and knew in a general way from "common reports" that the bonds of this and the First Div. mortgages had been negotiated and were held in Holland (143, C. Q. 132,) yet he never knew of the powers of attorney from the Dutch committee and from Lippmann, Rosenthal & Co., (Defts. Ex. 3 and 4, pp. 831-7,) filed in the suit in which he was appointed receiver, pursuant to the order of Dec. 18, 1874, and containing schedules of the bonds held by that firm and the committee, respectively .(Farley, 147, C. Q. 158-160.)

He did not know that the stock of the St. Paul & Pacific Co., belonged to the Northern Pacific R. R. Co., but supposed that it belonged (like that of the First Div. Co.) to the Messrs. Litchfield. (107, Q. 274-6; 160, C. Q. 220.)

He also testifies that it was not until *after* March 13, 1876, that he had *any* information as to the amount of the mortgage bonds, or as to the mortgages securing them, of the First Div. Co. (127, C. Q. 31; 145, C Q. 149.)

And later, when called for defendants he says: "I knowed but little about these First Div. bonds until I went down there and became general manager and became familiar with the liabilities of the company as well as the assets. I knowed but little about it." (1385, Q. 152.)

Nor had he any special information as to the property, business, or earnings of the First Div. Co. He admits this in his testimony. (142, C. Q. 130; 1402-3, Q. 227.)

He was not even aware that all the company's freight at St. Paul was handled by Mr. Hill. (139, C. Q. 111.)

Nor had he then (nor has he ever had) any knowledge of the character or amount of the stock of the First Div. Co. (160, C. Q. 222.)

Though he knew, as every one knew, that it was owned by the Messrs. Litchfield.

It was one of the grounds of complaint of the bondholders, of their agents, and of their trustees, that the management of the First Div. Co. would not furnish them with information as to its property, obligations or business. (Defts.' Ex. 133, p. 1793; Carp's Report in 1873, p. 468.)

Asked as to what he knew about the management and business of the First Div. Lines, he says "I knew a very little, sir; only from common report, and from what little I saw in passing over the road occasionally." (142, C. Q. 130.)

Of course his relations with the management were not friendly. He says (142, C.Q.129,) that Mr. Becker treated him "very ungentlemanly and very unkindly," but "I never had any hard feelings towards Mr. Becker."

Whatever plaintiff's feelings or his motives, he loses no opportunity, in his correspondence, to disparage Mr. Becker.

Thus, he writes to J. S. Kennedy & Co.: "The dishonest manner in which everything is conducted, connected with a rule and reign of George L. Becker and First Div. Co., keeps my mind continually harrowed up." (Jan. 16, 1875. Plff.'s Ex. 30, p. 206.) "Geo. L. Becker, with his retinue of hangers on, is still managing the First Division matters with as much pomposity as if he was lord of the situation." (May 28, 1875. Plff.'s Ex. 34, p. 210.)

On August 13, 1875, an agreement was entered into between The First Div. Co., the Dutch committee, and the Messrs. Litchfield, for a settlement of their differences and a readjustment and redistribution of the bond and stock liabilities of the company—involving, of course, a scaling down of the bonded indebtedness. By article 24 the agreement was not to take effect until executed by the holders of a majority of the bonds of each issue, and it was provided that, within 30 days from the last date, the board of directors should be so changed as to secure to the Dutch committee the appointment of a majority of the board, and to place the company and all its property and effects in the possession and control of the committee. (1530.) Article 26th declared that the agreement was made on the express condition that it should become absolute and irrevocable whenever 90 per cent. of the bondholders

should have executed it and deposited their bonds in accordance with its provisions; but if at the end of a year from its date, (*i. e.* by Aug. 13, 1876,) the assent of the holders of 90 per cent. of the bonds of the various issues should not be obtained, either party to the agreement might rescind it.

This agreement is Defendants' Ex. 149, pp. 1508, *et seq.*

The necessary conditions having been complied with, the board of directors was changed at a meeting held Feb. 12, 1876, so as to give a majority to the bondholding interest, and Mr. Barnes, of J. S. Kennedy & Co., was, on Feb. 16, 1876, made president, and Mr. Farley general manager. (Defts.' Ex. 151, 152, pp. 1538-9; Plff.'s Ex. 68, 69, 70, 70½, pp. 235-9)

On Monday, March 13, 1876, Mr. Farley took possession as general manager *for the company*, under this appointment of the board of directors, made pursuant to amicable compromise between the stockholders and the company, on the one hand, and the Dutch bondholders on the other, embodied in the "Litchfield agreement." (Plff.'s Ex. 41, p. 218; Defts.' Ex. 142, p. 1493.)

By that agreement (art. 23, p. 1530) it was further provided that the foreclosure suits and all other suits between the contending parties on any of the mortgage bonds, "shall be and the same are hereby suspended, and such suits and all proceedings therein shall remain suspended absolutely until this agreement shall be rescinded as herein provided. And the parties of the second part, (the Dutch committee) who have caused such suits to be instituted, shall instruct their attorneys in Minnesota to act in accordance herewith * * * and unite with the said parties of the first and third parts to prevent any decision being made, pending this agreement, which might render more difficult the carrying of the same into effect." (Defts.' Ex. 149, pp. 379-380.)

And the appeal to the supreme court from the order refusing a receiver was accordingly suspended with the other proceedings. (Letter July 25, 1876, Barnes to Farley. Plff.'s Ex. 94, p. 257.)

Immediately on taking possession, plaintiff occupied two days (March 14 and 15) in an inspection of the Branch line, and the two following days (March 16 and 17) in an inspection of the Main line. (Farley, 1402-5, Q. 227-240; Defts.' Ex. 142, p. 1493.)

Fisher accompanied plaintiff on his trip over the Main line, and says that "there was considerable snow on the ground, and it was a spring snow. We were delayed some west of Willmar." (390, C. Q. 377.)

And plaintiff says that large winter drifts were still upon the ground. (1405, Q. 245.)

Towards the end of the month, Mr. Barnes, the new president, visited St. Paul, remaining "a week, maybe ten days," according to plaintiff, (69, Q. 73,) or "some 10 or 15 days," as he says when afterwards called by defendants. (1375, Q. 103.)

Plaintiff says (though the statement, for reasons that will be stated, is probably incorrect) that among the matters discussed between himself and Mr. Barnes, on this visit, was the building of a connection or "cut-off" or "link," as it is variously called in the testimony, between Breckenridge, the terminus of the Main line, and the southerly end of the ironed part of the St. Paul & Pacific road in the Red River Valley—a point 12 miles south of Glyndon, known as Barnesville or Barnes. The advantage of such a connection to the Main line, and its necessity to the detached part of the St. Vincent extension, were obvious, and became apparent to Mr. Farley as early as December, 1873. (Plff.'s Ex. 11, p. 188.) Early in 1875 a project for building this link was discussed between Mr. Farley and Messrs. Hill and Kittson, the latter proposing to advance money enough ($15,000) to pay duty on 1,000 tons of rails in bond at Duluth, and in dispute between the receiver and De Graff & Co. (Farley, 66, Q. 66; Plffs' Ex. 33, 34, pp. 208-9.)

And on June 5, 1875, Messrs. Kittson and Hill caused a corporation to be organized by the name of the Red River Valley Railroad Co., for the purpose of building this and other railroads in the Red River Valley. And on June 22, 1875, the board of directors of this company took action toward raising the money to build this link by bonds to be negotiated through Donald A. Smith, and secured by mortgage to him as trustee. (Hill, 587-590, Q. 124-133; Defts.' Ex. 6 and 7, pp. 905-9.)

Plaintiff, at the outset, says in regard to the building of the cut-off: "There was no definite plans until 1876, after my appointment

as general manager," (135, C. Q. 73,) but "in rebuttal" he takes pains to falsify this statement (1656-7, 1706-8.)

In point of fact 1876 was the one year in which such plans were not and could not be considered.

Mr. Hill testifies that he negotiated not merely with plaintiff but with the latter's opponent, Mr. Becker, who was president and manager of the First Div. Co., and who appears as an incorporator and director of the Red River Valley Co., and who introduced the resolutions at the directors' meeting of June 22, 1875, for a mortgage to Donald Smith, etc. (Defts.' Ex. 7, p. 908.)

Plaintiff further says that during this visit of Mr. Barnes in March and April, 1876, "he sought an opportunity of becoming acquainted with" Messrs. Kittson and Hill, who "were strangers to Mr. Barnes," on account of this Breckenridge-Barnes link. That an interview was had, "but complications of one kind and another prevented them from seeing their way clear to do anything at that time." (69 Q. 74.)

It is, however, conclusively shown by defendants that to Mr. Hill, at least, Mr. Barnes was no stranger, and needed no introduction; and that the interviews then had between these gentlemen concerned matters much more closely related to the issues in this case than the building of the cut-off.

Plaintiff's new position, while it doubled his salary, more than doubled his labors. In anticipation of it he writes on Dec. 21, 1875: "I am negotiating with parties and expect to be able to get free from much of my business matters in Iowa, in order to give the work in Minnesota nearly all my personal attention." (217, Plff's Ex. 40.)

Soon after taking possession he "for the first time learned" that Mr. Hill was handling all the First Division Co's freight at St. Paul, its principal station, under a contract which he considered unfavorable to the company. He accordingly put an end to it. (139 C. Q. 111-114.)

Mr. Hill also had a contract for furnishing the company with wood,, and "there was a great deal said by the public that Mr. Hill had privileges that nobody else conld get." This contract also

plaintiff put an end to before May 8th. (Farley 141, C. Q. 115, 116; Plffs. Ex. 47 p. 221.)

Plaintiff was absent at times in Dubuque, but "when here I spend 18 hours out of every 24 trying to understand all about the machinery of the road." (Letter May 22, 1876. Defts.' Ex. 144, pp. 1494-5.)

Some of this time seems to have been spent in hunting for matters that might prejudice Mr. Becker. And in the letter last referred to he recurs to a charge he had made (and which Mr. Barnes had discredited) about Mr. Becker having received free transportation of freight to the amount of about $1,800. As plaintiff "never had any hard feelings toward Mr. Becker," (C. Q. 139) he was doubtless pleased when the defendants proved that this rebate of freight charges was pursuant to an agreement made before the freight was carried, and because the transportation for which the charges were made was in the company's interest; and further that the rebate was pursuant to a vote of the board of directors, concurred in by the Messrs. Litchfield, owners of all the stock. (Defts.' Ex. 150, p. 1538.)

Although spending 18 hours daily in the service of the company, Mr. Farley found time to make inquiries as to the amount of its bonded indebtedness and the mortgages securing it. (Farley, 145, C. Q. 149.)

These inquiries all began after he became general manager. He got information as to the amount of bonds outstanding from Mr. Breed, the auditor. (127, C. Q. 31.)

In the last answer, plaintiff says, speaking of the extension lines: "All I knew about the liabilites was from general report, and everybody understood it the same way."

When examined as a witness for defendants, plaintiff was questioned and testified more in detail as to the steps taken by him to inform himself as to the bonds and mortgages of the First Div. Co. He first learned about the bonds from Mr. Breed, the auditor. (1385, Q. 154; 1411-4, Q. 276-288; 1419, Q. 303.)

And *after* learning about the bonds, "it was very natural for me to inquire about how these bonds were secured on this property. No doubt I got it through Mr. Otis, on account of asking him to

inquire about it"—Mr. Otis being the attorney for the trustees and bondholders. (1420, Q. 309-312.)

Plaintiff, *after* becoming general manager, on March 13, 1876, also found time to inform himself as to the "rated" (by which he means the market) value of the bonds in Holland.

The bonds of all four issues secured by mortgage on the First Div. land grant were receivable at par as cash in payment for lands. After the default in interest in 1873, the bonds of course fell in price, (and see Mr. Kloos' affidavit in Defts.' Ex. 134, p. 1794,) and persons in St. Paul engaged actively in buying the depreciated bonds in Holland, to sell to land-purchasers in Minnesota. Among these operators was Mr. Henry P. Upham, then cashier, and now president, of the First Nat. Bank of St. Paul. (Upham, 1071, Q. 9-10; Defts. Ex. 15, 16, 115, 116, pp. 916-918, 1119-1120.)

As early as December, 1874, Messrs. Kennedy & Co. had written to plaintiff, as their agent, to learn whether a small lot of Main line bonds, held by one of their customers, could be sold in St. Paul and at what price, and plaintiff (or Fisher for him) had made inquiries, among others, of Mr. Upham. (1109-1110.)

This inquiry had reference to the price obtainable for a small lot in *St. Paul*, and not to the "rated value" or market price of the bonds in Holland.

But after March 13, 1876, when plaintiff became general manager, (*and not before*) he made inquiries from time to time of Mr. Upham as to market quotations in Holland, and got information from him and not from any other source. Mr. Upham, as required by his business, kept himself informed as to these quotations. (Farley, 144-5, C. Q. 143-5; 145, C. Q. 149.)

Plaintiff might also have learned from Mr. Upham that the Amsterdam quotations were for small lots of bonds, outside the holding of the Dutch committee, and called "original bonds;" that the bonds held by the committee were tied up and could not be obtained, and were not quoted; but that the committee's certificates, representing the bonds held by them, were freely quoted and dealt in at the exchange. Mr. Upham had been informed of these matters as early as 1874 in the letters of Lippmann, Rosenthal & Co.

of Mch. 23, Apl. 1, June 2, and June 13, 1874. (Defts. Ex. 15, 16, 115 116; pp. 916-918, 1119, 1120.)

Mr. Upham, however, was not the only dealer in bonds in St. Paul, nor does it appear that he was the sole depositary in St. Paul of this information, or that plaintiff was the only person to whom he was willing to or did impart it.

It does not appear that plaintiff was informed by Mr. Upham, or was aware, that the market price was not accurately represented by the quotation, but was made up of the quoted price *plus* the amount of the running, unmatured coupon. Thus, if on June 30th, or December 31st, the bonds of the $15,000,000 extension mortgage were quoted at 5 per cent.—*i. e.* $50 for a $1,000 bond, the actual price would be this $50 and the amount ($35) of the interest coupon due the next day—in all $85.

If the quotation were on April 1st, or October 1st, the price would be $50 *plus* one-half the amount of the coupon—that is $67.50. (Upham, 1115, R. Q. 18.)

Of this very material fact, and its bearing on the published quotations plaintiff and Fisher seem to have been ignorant (Fisher, 342, Q. 85.)

Matters appear to have gone on smoothly under the Litchfield agreement, with nothing to indicate that it was not a finality, until July 15, 1876, when Mr. Kennedy wrote to plaintiff that it was probable the agreement would not be carried out, but would be rescinded by the committee at the end of the year, (Aug. 13th,) in which case, if Mr. Litchfield should "demand back control of the property, we might have to grant it until such time as we could dispossess him again through the action of the courts." (Plff's. Ex. 93, p. 255.)

And on July 25th, Mr. Barnes writes that he has unofficial information that the agreement will be rescinded, and that if Mr. Litchfield requires restoration of the control, "we must of course be prepared to give it. * * * Meanwhile we must get the house in order." (Plff.'s Ex. 94, pp. 256-7.)

On October 6th Mr. Barnes writes that the agreement was rescinded Aug. 13, but he has heard nothing from Mr. Litchfield, and does not know what course the latter intends taking. That

Mr. Barnes, as president, feels bound to turn over the control to him upon demand, "and meantime, during this interregnum, to take the best possible care of the property for all concerned in it. * * * This uncertain condition of affairs is very perplexing and embarrassing." (Plffs. Ex. 99, p. 259.)

During this period an important change was made, by which the bondholders, pursuant to powers in the mortgages, removed Mr. Becker from his trusteeship in the $2,800,000 and $6,000,000 mortgages, and appointed Mr. Kennedy trustee in each of the four First Div. mortgages in place of Mr. Tilden, who resigned. So that the trustees were—

In the $1,200,000 Branch and the $3,000,000 Main line mortgages: Edmund Rice, Horace Thompson, and John S. Kennedy.

In the $2,800,000 Branch line and $6,000,000 Main line mortgages: Horace Thompson and John S. Kennedy. (Stipulation of Facts, Defts.' Ex. 166, pp. 1583, *et seq.*)

Messrs. Rice and Thompson were leading citizens of St. Paul, the latter being president of the First Nat. Bank.

Soon afterwards, and on October 9, 1876, the trustees in each of the four mortgages, under powers therein contained, demanded and received from plaintiff, as the general manager *for the company*, possession of the railroads, etc., covered by the respective mortgages; but they did not take possession of the *land grants*. (Stipulation, Defts.' Ex. 166, p. 1586; Farley, 70, Q. 78.)

Plaintiff's view of this change in possession is that "the thieves are routed, but they are barking around very lively." (Defts.' Ex. 73, p. 1010.)

The trustees continued plaintiff in office as general manager *for the trustees in possession*, and this possession by the trustees, and plaintiff's position as general manager for them, remained unchanged until the property was delivered to the purchasers under the decrees in foreclosure.

Conclusions from the Foregoing Evidence.

From the evidence above recited, most of it introduced by plaintiff, it very clearly appears:

1. That down to March 13, 1876, the plaintiff's railroad operations in Minnesota had been on an extremely limited scale. And

that if, when the alleged agreement was made, and while the negotiations which resulted in it were pending, plaintiff had made a reputation *in that state* as a railway manager, (and we have his oath for it that he had,) and especially if, at the time of the negotiations, plaintiff had made such improvements in the First Div. property as were obvious even to the untrained eye of Mr. Kittson, so that he remarked upon them, and gave them as a reason why plaintiff must manage the property after it was acquired, and in any other case he would have nought to do with the project, (and all this, too, plaintiff and Fisher swear to,) then the inception of the negotiations must be put at a date several months after March 13, 1876.

2. Down to March 13, 1876, plaintiff had no more acquaintance than the general public with the property and business of the First Div. Co., and far less acquaintance with its traffic than Mr. Hill had, who, under his two contracts, handled a very large part of it. Moreover, plaintiff's hostile attitude, as representing the bondholders, towards Mr. Becker, and their unfriendly personal relations, shut him off from scources of information that were open to those friendly to the management, and especially to Mr. Hill. So that if, when the negotiations for the agreement began, plaintiff was possessed of information on those subjects so far beyond that possessed or which could be obtained elsewhere by Messrs. Kittson and Hill, those negotiations could not have begun until some months after March 13, 1876.

3. Down to March 13, 1876, plaintiff had no knowledge as to the mortgage bonds or the mortgages on the First Div lines, or of the amount of bonds outstanding, or of their "rated value" in Holland, or of the amount of the lands of the company. And if, when the negotiations for the agreement began, plaintiff had acquired that full and accurate knowledge on these subjects which he says he then possessed, and which was indispensable to the success of the enterprise, this is another proof that the negotiations could not have begun until some months after March 13, 1876.

4. Plaintiff took possession as manager *for the company*, under an amicable agreement, by which the differences between the stockholding and bondholding interests were laid at rest. So long

as that agreemeet bade fair to be perpetual, a reasonably intelligent man would hardly set on foot *for the first time* such an enterprise as that in question, still less would the protracted negotiations take place, and such an agreement be made as plaintiff alleges. If persons were *already engaged* in such a project, especially if they had been so engaged for two years prior to March 13, 1876, they might well refuse to give it up and throw away their labor. But that is a very different thing from originating and setting on foot such a project, and spending a month in instructing and persuading the ignorance and reluctance of others, and making a definite agreement, and laying the scheme before capitalists, and instructing and persuading them—all at a time when there was nothing to indicate that the realization of such a project was in any way probable.

The negotiations, then, could not have been started—certainly the First Div. could not have been included in the scheme—so long as the Litchfield agreement was in force with no reason to suppose that a right to rescind would arise or be exercised, and while the relations of all parties were amicable, and promised to continue so.

So late as June 10, 1876, Mr. Barnes writes, "we have one cause for congratulation, that our friends and those supposed to be opposed to us are satisfied with the management." (Plff.'s Ex. 88, p. 253.)

And it was not until July 15, 1876, that plaintiff received his first intimation that the right of rescission on August 13th might arise or be exercised. (Plff.'s Ex. 93, pp. 255-6.)

Hence it is at least improbable that any steps towards setting such a scheme on foot should have been taken prior to the middle of July, 1876. And the parties would not be likely to go so far as to make a *definite agreement* until it was known what course Mr. Litchfield, would take, or until hostilities should have been renewed —as they were by the seizure of the lines by the trustees on October 9th.

For all these reasons, no such agreement as that alleged could have been made until the autumn of 1876. And accordingly the plaintiff, in choosing a date that should be in harmony with ante-

cedent events, swears that the agreement was made *after* the trustees took possession, which was on October 9th. True, the supposed needs of his case compel him afterwards to put that date forward and prior to June 3, 1876. But this does not alter the fact that on numerous occasions he swore that it was in the autumn, and still less does it alter the fact, patent from the foregoing evidence, that it *could not* have been made before the autumn.

SECOND.

PLAINTIFF'S AND FISHER'S ORIGINAL TESTIMONY AS TO THE ORIGIN OF THE ENTERPRISE, AND THE TERMS AND DATE OF THE AGREEMENT AND THE NEGOTIATIONS THAT LED TO IT.

I.

PLAINTIFF'S TESTIMONY AS TO THE NEGOTIATIONS AND THE AGREEMENT.

This is found at the following places in the Record:

Pp. 71-79, Q. 83-101. Pp. 144-5, C. Q. 139-149; 153, C. Q. 186e.

Plaintiff, testifying October 18, 1887, says:

(P. 71; Q. 83): The first conversation that ever occurred on that subject, Mr. Hill came into my office, and told me that he had some conversation with Mr. Fisher about the price of the St. Paul & Pacific *and First Division* of the St. Paul & Pacific bonds. Mr. Fisher through me *was familiar* with the quantity of bonds *on each piece* of property, and about their rated value in Holland. There was none in this country to my knowledge, but through me he became familiar with the rated value of those bonds in Holland; *of each kind of bonds*. There *was five different issues, maybe six*, altogether.

He come to me and told me what he had learned through Mr. Fisher as to the number of bonds outstanding and about their rated value in Holland; and Mr. Hill thought there would be a big speculation in buying those bonds. I agreed with Mr. Hill as to the speculation,—it would be a big one if the money could be raised to do it. Mr. Hill continued this kind of talk with me from day to day, and, as I knew Mr. Hill to be a man that was very fond of talking, I continued to hear what he had to say. I think it was the second talk I had with Mr. Hill that he suggested the idea (and

very emphatically too) that he believed Mr. Kittson had influence enough with one Donald A. Smith, of Montreal, Canada, to raise that amount of money, and, if he was correct in that conclusion, he was in favor of buying those bonds in view of inheriting the property at the foreclosure sale then being in the courts. From time to time, *running through a good many weeks*, Mr Hill and Mr. Fisher continued to talk to me about this matter of purchasing the bonds. I agreed with them that it was a good thing, but I did not see where the money could be raised.

Finally Mr. Fisher informed me that Mr. Kittson would like to have an interview with me on that subject, and Mr. Fisher informed me that he had appointed a time and place where Mr. Hill and Mr. Kittson would meet me.

According to appointment, I was in my office at the time appointed for this interview. (P. 72:) Mr. Fisher was with me at the office at the time. Mr. Kittson and Mr. Hill came according to appointment with Mr. Fisher. Mr. Hill and Mr. Kittson came into the office, and, after the compliments of the day, Mr. Fisher being present with me, Mr. Kittson broached the subject of the nature of their visit, by saying that he had a good deal of talk with Mr. Fisher and with Jim Hill,(Jim as he called him) about the propriety of buying these bonds in view of inheriting the property at the foreclosure sales. I replied to Mr. Kittson, what was the fact, that Mr. Hill and Mr. Fisher had been having the same kind of talk with me, and that I agreed with him that it was a good project and enterprise to go into if the money could be raised. I doubted the matter of raising the money. Mr. Kittson then and there, in the presence of Mr. Hill, Mr. Fisher and myself, said that he had been thinking about the subject, and either had seen Mr. Smith or corresponded with him—I don't know which; but he was satisfied that he could raise the money through Mr. Donald A. Smith, of the Montreal Bank. Mr. Kittson being a man that was entitled to a great deal of credit in all that he said or done gave me great confidence that he was correct; that the money could be raised; up to that time I doubted it. But said that he had both said to Mr. Hill and Mr. Fisher, in former interviews with them, that he would have nothing to do with the purchase of these bonds unless I would join them; going on to state in the same connection that "I know nothing about a railroad; don't want to know. Jim Hill knows nothing about the management of a railroad, and *it would be folly for a man to go into an enterprise of this kind, even if they were successful, without some person with them with railroad ability and experience to manage the property.*" My reply to Mr. Kittson was that I had

no ability to raise any large sum of money, but if he could raise it and was satisfied of that fact, I was willing to join them.

(P. 73, Q. 85): After my consenting to go in with them, there was a great deal said about the *future management* of the property. It was to be under my control—the management, and, *on account of my reputation that had been established here in the management of the property*, they both agreed that I should retain the management of it.

Mr. Hill had a great deal to say about how this interest should be divided. *He gave his reasons by saying that the control should be kept in St. Paul;* and that Mr. Kittson was to have one-fifth, I was to have one-fifth, Mr. Hill was to have one-fifth, and the two-fifths were left to be divided or given to the parties—Mr. Donald A. Smith and his friends—who were going to raise the money. I insisted that that was a matter that would have to be considered hereafter. I thought it was a good plan to interest some prominent citizens of St. Paul in this matter, on account of the future influence in the legislature, and otherwise for the benfit of the property. Mr. Kittson didn't say anything about that. He didn't say whether he favored my view or Mr. Hill's. He seemed to be indifferent on that subject, and it was left about in that way —that three-fifths should be controlled in St. Paul as Mr. Hill had suggested, one fifth to Mr. Kittson, and one to Mr. Hill, and one to me.

(Q. 86:) At that interview that was all that was said about the division of the interests. It was left with that understanding. There was a great deal said by Mr. Kittson and Mr. Hill both about the *future management* of the property and its prospectve value, and Mr. Hill figured up the number of acres of land, that was then owned by the company, and the number of miles of finished railroad, number of locomotives, number of cars, terminal facilities in St. Paul and Minneapolis.

(Q. 87:) There was a good deal said, by myself principally, in the presence of Mr. Hill and Mr. Kittson about the reorganization of this property when it was sold under foreclosure proceedings; (P. 74:) that a new company would be organized, and a sufficient number of bonds issued—mortgages placed upon the property and bonds issued—which would sell at par, and, according to our calculations, worth from four to five millions of dollars. With a mortgage of all this property behind it, it would make the bonds very good, and would sell at par, and that our profits would consist in owning all the stock.

(Q. 88:) Mr. Kittson and Mr. Hill had no opinions about it, because they knew nothing about it. It was all new to them, about

the organization and issuing bonds—something they didn't know anything about. They may understand it now, but they didn't then, sure. This kind of a general talk between us lasted possibly two hours. Mr. Kittson, Mr. Hill, Mr. Fisher, and myself were present all the time.

On page 77, Q. 94, plaintiff, after answering a question on another matter, says:

"There is one little circumstance connected with the first interview I had with Mr. Kittson and Mr. Hill that I forgot to mention before. *It may be important or unimportant—I don't know.*"

And being requested by his counsel to state it, he says:

(Pp. 77-8, Q. 95-6:) In our first interview there, where we agreed to go into the matter of purchasing the bonds, it was considered, by Mr. Kittson particularly—Mr. Kittson said: "Mr. Farley, you are receiver under the court of one of these lines of road, and *general manager* of the other line *under the trustees in possession*, and, in order to success in this enterprise, it would be best for you not to be known in it, for *here are the Litchfields* and Mr. Bigelow and Mr. Becker *fighting for the possession* of the property,"—as he called it, "fighting;" it was in the law business for the possession of the property:—"If it was known by those parties that you are interested in the purchase of the bonds, these parties would go to the court and ask for your removal, and in that event I wouldn't give a dollar for the whole thing. I wouldn't invest a dollar in the whole thing." Upon a moment's reflection, I thought Mr. Kittson was right about it, and then and there, with Mr. Hill, Mr. Fisher and myself, it was sacredly agreed—

(P. 78, Q. 97:) Mr. Kittson and myself agreed that that was the best plan to pursue, and Mr. Fisher, as a matter of course, had nothing to do with it, and Mr. Hill didn't object to it,—thought maybe it was a good thing. That was a very sacred point with Mr. Kittson clear through the whole transaction. He looked at it as very important.

(P. 78, Q. 99:) It was agreed on that subject that I was to give my entire attention to the management of the property, and to furnish them with all the advice and knowledge and experience I had on the subject, and they were to go forward, Mr. Kittson and Mr. Hill, with their associates whom they might interest in Montreal, and carry this enterprise to a completion in the best possible way they could.

On the next day, October 19, 1887, plaintiff continues:

(P. 79, Q. 101:) These conversations, to the best of my recol-

lection, *commenced in the month of August, 1876*, and continued into the month of September of the same year, 1876. At the time and place referred to in my deposition of yesterday, when Messrs. Hill, Kittson, Fisher and myself were present, it was there very plainly talked of between Mr. Hill, Mr. Kittson, and myself, and particularly Mr. Kittson. Mr. Kittson said that he believed he could control the amount of money necessary through Mr. Donald A. Smith and his associates—*Stephens*—by giving to them a two-fifths interest in the purchase of the bonds and property when inherited through the sale of the mortgages being foreclosed, by this means leaving three-fifths to be owned and controlled by himself (Mr. Kittson) and Mr. Hill and Mr. J. P. Farley (myself,) thereby holding the balance of power in Minnesota; but under all circumstances the interest between Mr. Hill, Mr. Kittson and myself was to be equal.

Plaintiff was not cross-examined as to these conversations, except that he was asked what he means by the "rated value of the bonds" which Mr. Hill had obtained from Mr. Fisher, and he says he means "sales actually made on the market at Amsterdam," of the minority and floating bonds not in the hands of the Dutch committee, the bonds in the hands of the committee not being offered for sale. (144, C. Q. 139-142.)

At a later stage of the case, the plaintiff, under examination by defendants, *volunteered* the statement; "I said when we formed the syndicate—I said then and there that *John S. Kennedy & Co. were going to be the great factors* in trying to get these bonds. The Dutchmen would never sell the bonds until it was recommended by John S. Kennedy & Co.; and *I said they were very dear men, but they had to be interested in some way to recommend this thing before the bonds could be purchased of the Dutchmen.*" (1362.)

II.

FISHER'S TESTIMONY.

This is found in the following places in the Record:

Pp. 341-8, Q. 84-100.
351, Q. 117.
367-371, C. Q. 116½-145.
373-380, C. Q. 154-215.
381, C. Q. 226.
382-4, C. Q. 229-249.
388-390, C. Q. 368-373.
391, C. Q. 381.
392, C. Q. 385.
394-402, C. Q. 399-449.

On November 21, 1887,—a month after plaintiff's deposition—Fisher testified as follows:

(P. 341, Q. 85:) Mr. Hill and myself, and Mr. Kittson and myself, and Mr. Farley, had all talked a great deal about building the Breckenridge cut-off. When Mr. Hill came into my office the morning I referred to, which I think was in the early part of August, 1876, *we had some talk about the cut-off*; and then I told Mr. Hill that I knew of a big thing if he had the money. (P. 342:) I told him that the St. Paul & Pacific bonds (or, as we commonly called them, the Extension Line bonds) were quoted on the market in Holland at five cents on the dollar. There were $15,000,000 of the bonds, which, at that price, would only be $750,000; that the company had about 104 miles of completed road, for which they were entitled to 6,400 acres of land for each mile; and then had a general talk about what it would cost to complete the lines as was originally contemplated, and about the amount of grading that was done on the balance of the road. At that time there was a little over 30 miles—34 or 35 miles—completed from St. Cloud to Melrose, and 104 miles of completed road, or about that, from 12 miles south of Glyndon north. I think the iron was laid to 28 miles north of Crookston. He seemed very much interested in it, and, after we had discussed it awhile, he said he could get that money. He then got up and went into Mr. Farley's office a minute, and then went out of the building.

(P. 342, Q. 86:) I think it was the next day or two, or a very few days after that, Mr. Hill came into my office, and wanted me to go with him and see Mr. Kittson.

(Q. 88:) Mr. Hill and I went to Mr. Kittson's office, and Mr. Hill done the most of the talking. He told Mr. Kittson about the railroad property—what the bonds were quoted at, etc.; and, in making his statements to Mr. Kittson, he would frequently refer to me to ask me if such and such a statement was not so; but Mr. Kittson said very little.

(Q. 90:) Mr. Hill came into my office a few days after that, and wanted me to go and see Mr. Kittson again. (P. 343, Q. 92-3:) Mr. Hill and myself went to Mr. Kittson's office, and we had a general talk about the St. Paul & Pacific R. R. Co., and at that time there was a little talk about the *First Division* of the St. Paul & Pacific R. R. Co., and Mr. Hill done most of the talking. Mr. Kittson said very little; and I said very little myself, except to answer Mr. Hill's questions.

(P. 343, Q. 94:) I think it was the next day that Mr. Kittson came into my office. (Q. 95:) Mr. Kittson asked me if I would

not come to his office about ten o'clock Sunday morning, and says: "Don't say anything to any one about it, but just come up there quietly. I want to have a talk with you."

(Q. 97:) I went to Mr. Kittson's office that Sunday morning. Mr. Kittson was there alone. He closed the door and asked me to sit down, and then handed me a cigar. He says: "Now, Mr. Fisher, Mr. Hill will talk by the hour about this railroad business, and when he gets through, I know about as much as when he started. I wish you would take your time and explain the whole thing to me." I went over the whole thing with him; told him what portions of the Extension lines were completed, and, as near as I could, the amount of grading that was done; that there were $15,000,000 of bonds issued, and about $11,000,000, or between $10,000,000 and $11,000,000—in that neighborhood—had been sold; that the balance had been put up as collateral with Lippmann, Rosenthal & Co., bankers in Amsterdam, Holland, for a loan of about $800,000—I believe that was somewhere near the amount—and that they were quoted on the market in Holland at five cents on the dollar.

He then asked me: "What about the *First Division?*" I told him as near as I could about the First Division matters, that is, the First Division of the St. Paul & Pacific R. R. Co.; (P. 344:) that they had 207 miles, I believe, from St. Anthony to Breckenridge, called the "Main line," that was completed, and 75 or 76 miles, somewhere in that vicinity, from St. Paul to St. Cloud; and told him as near as I could what bonds were out—[and he goes on to state in detail the different issues of bonds and the property covered by each mortgage, as he says he stated it to Mr. Kittson. He does not remember the prices of these bonds as stated by him to Mr. Kittson, only that they ranged from 15 to 35 cents on the dollar.]

Mr. Kittson says: "If I can assure my friends that they are sure of seven per cent. on the money, I can find the money; but I cannot make a success of this unless we have Mr. Farley interested." He said that he wasn't a railroad man, and Mr. Hill was not. He says: "It may be that we can't get all of these bonds, or a majority of them, at the prices at which they are quoted at, and I would want Mr. Farley interested, so as to have his judgment as to what we could afford to pay for the different classes of bonds." He then asked me if I would not talk with Mr. Farley about it, and see if he would be interested in this deal with us. He said, also, that he wouldn't have anything to do with it anyway, unless Mr. Farley was interested; that even if they should buy the bonds, and get the

property, they would have to depend upon Mr. Farley; and then he says: "And you to assist him in the management." He says: "*Mr. Farley has made a great change in that property since he has managed it*, and we have great confidence in him." I says: "All right, Mr. Kittson, I will talk with Mr. Farley, and see what he says."

I went down to the office, and Mr. Farley was there, and I told Mr. Farley what talk had taken place between Mr. Hill, Mr. Kittson, and myself. I went over the whole thing with him. (P. 345:) Mr. Farley didn't say whether he would or would not become interested, but he made this remark. He says: "Fisher, where is Kittson and Hill going to get the money to buy these bonds?" So I didn't press the matter any further at that time.

The next morning I called to see Mr. Kittson, and told Mr. Kittson that I had an interview with Mr. Farley, and had reached no conclusion. "I will talk with him again, Mr. Kittson, as soon as I get a good chance; but Mr. Farley asked me one question that will be necessary for me to answer before he will decide what he will do in the matter. He wanted to know where you gentlemen were going to get the money, Mr. Kittson." And Mr. Kittson laughed and said that Donald A. Smith was an old friend of his, and I think he said—I will not be positive about that, however,—I think he said he was a director in the Bank of Montreal. But anyway he did state he was *a relative of Mr. Stephen*, the president of the Bank of Montreal, *and it was through that channel that he was going to get the money*. He says: "You can assure Mr. Farley that there will be no trouble about the money matter."

I had no opportunity to talk with Mr. Farley again until the next Sunday. We met in the office in the morning, and was having a general talk about the whole road, and Mr. Farley was feeling a little blue that morning, and in the conversation Mr. Farley says: "Fisher, the Dutch can afford to give away 25 per cent of their bonds to the right parties in Minnesota for the sake of having some home influence here." He says: "All being foreigners, they legislate them to death." I spoke up then. I said: "Mr. Farley, that is just what I have been talking to you about. You know that the Dutch will not furnish the money to complete these lines, and they are worth nothing now in these disjointed fragments. Now, if you can help the Dutch sell their bonds at what they are willing to take for them, and help Mr. Kittson and Mr. Hill get them, so that they have got a good thing, and save this land grant, and secure the completion of these lines, and make some money out of it yourself, whose business is it, and what harm is there in it;

haven't you really done a good thing?" He hesitated a moment, and he says: "There ain't no harm in it, and its nobody's business; but where is Kittson and Hill going to get the money? How are they going to buy these bonds?" Then I told Mr. Farley that I had seen Mr. Kittson, and that he and Donald A. Smith were very warm friends, and Donald A. Smith and the president of the Bank of Montreal (P. 346:) were related in some way, and *it was through that channel that they proposed to get this money.* I says also: "Mr. Hill is very anxious about this, and *Mr. Hill says that Mr. Stephen has some wealthy connections*, I think wealthy bank connections, in England." I says: "Mr. Farley, why won't you see Mr. Kittson and Mr. Hill, and see what there is to it?" He says: "Yes, I will see Mr. Kittson and Mr. Hill." I says: "Shall I arrange an interview?" He says, "Yes."

(Q. 99:) I went and notified Mr. Kittson, and told him of the talk I had had with Mr. Farley. He says: "All right; we will be down there in a day or two." They came to Mr. Farley's office.

(Q. 100:) I mean Mr. Kittson and Mr. Hill. The meeting was in Mr. Farley's office. It was Mr. Kittson, Mr. Hill, Mr. Farley, and myself. After they had exchanged a few remarks, and talked a little about the pleasant day, and so on, Mr. Kittson spoke up, and he says: "Mr. Farley, I suppose Fisher has told you what we were talking about." Mr. Farley smiled, and said: "Yes; Fisher says you and Mr. Hill want to buy a railroad." And they all laughed, and Mr. Hill said: "Yes, it looks that way." Then Mr. Kittson asked Mr. Farley what he thought about the purchase of these bonds. Mr. Farley said: "If they could be bought at anything like the prices they are quoted at, there is a big thing in it." Mr. Kittson asked him if he would be interested with them. Mr. Farley said: "It will take some money to buy those bonds, Mr. Kittson." Mr. Kittson said: "Yes, but I guess I can raise the money all right." Mr. Hill spoke up and says: "There is no trouble about the money, Mr. Farley." Mr. Kittson says: "We want you interested, Mr. Farley." He says: "I won't have anything to do with it unless you are interested with us." He says: "We don't know anything about railroads." And he said then to Mr. Farley substantially what he had said to me before, that they might not get all of these bonds at present prices, and he would have to depend upon his judgment as to what they ought to pay. Mr. Farley told Mr. Kittson that he had no money. He said: "I have no money, Mr. Kittson." Mr. Kittson said: (P. 347:) "*We don't want you to furnish any money.*" Mr. Hill says: "Certainly not." Then *Mr. Hill* explained how they would get the money. He went over the

thing again about Mr. Kittson's acquaintance and friendship with Donald A. Smith, and his relations, etc., with *Mr. Stephen*, the president of the Bank of Montreal; and it was through that channel that they were going to get the money. Then Mr. Kittson says: "We will furnish the money, Mr. Farley. We don't want any money from you. What we want from you is your judgment and advice, and we will attend to the rest of it."

Mr. Farley asked him then how many there would be interested. Mr. Kittson said: "We will have to take in *a couple* of those Montreal men, Mr. Farley. That would make five of us—the two Montreal men and us three; that would give us one-fifth each." Mr. Farley says: "Don't you think we had better take in Horace Thompson, and two or three other prominent men here, for the sake of their influence?" Mr. Hill says: "No; we don't need them." Mr. Kittson spoke up and said: "I don't think that is necessary." Then Mr. Farley asked them if they thought the Montreal men would be satisfied to furnish this money, and have only a two-fifths interest in the property. Mr. Hill spoke up and said: "Why, yes; they are doing well enough. They probably won't put in a dollar of their own money; *they will get the money through the bank*." He says: "We want a majority here in St. Paul." Mr. Kittson spoke up and said he thought they would be satisfied with that; "but if anything comes up that makes it necessary to take in anybody else, we can consider that then, and take them in, if necessary; but whatever we do, we will divide our St. Paul interest equally among us three here." Mr. Hill said: "All right." Mr. Farley said: "That is all right."

Then they talked a good deal about what they would do in case they bought these bonds. Mr. Farley says: "If you get the majority of the bonds, or as near the whole lot of them as you can, the thing to do is to try and settle with Litchfield, and get his stock. If you can get the Litchfield stock, you would save a good deal of time and expense in foreclosing; but if you cannot get the Litchfield stock, why you will have to step into the Dutch shoes—take the place of the Dutch bondholders—and go ahead and foreclose; organize a new company; put on all the securities the property will bear; use enough of the securities to pay back what the bonds cost; and the balance is the profit in the thing." Then he took his pencil and went to figuring, and (P. 348:) he figured over and he made an approximate estimate of what it would take to buy all of these bonds, and about what it would take to complete the road. They had considerable talk about that.

Then Mr. Kittson spoke up, and spoke about *the former man-*

agement, and says: "We will have to keep this thing to ourselves;" and Mr. Hill says: "Certainly." He says: "It won't do to let anybody know anything about it." He said: "If *Becker* knew what was going on, he and Bigelow would move heaven and earth to get you out of here." And Mr. Kittson says that it wouldn't do to let it go back to *the former management*; that they would skin the thing alive; and, if they did, he wouldn't want anything to do with it. Mr. Farley turned around to me then, and said: "Now, Fisher, we will have to keep this thing perfectly quiet."

I think that is the substance of the conversation. I think I have stated it about as it was.

On cross examination Fisher testifies to the dates of the different conversations as follows: He says (367, C. Q. 116½) that the *first conversation* with Mr. Hill "was *in the summer* of 1876. I think it was early in August; won't be positive about the date;" and (C. Q. 117) that between the first conversation and the final interview in Mr. Farley's office, "*it was about a month.*" And he says (368, C. Q. 118) that this final interview "may have been early in September. *These talks were all during warm weather.* Now the day we were in Mr. Farley's office *it was before we had commenced to have any fire, but it was cooler*; it was a nice cool day, and it was before the trustees took possession." And further on (368, C. Q. 122, 123:) "We had no fire. It was a right pleasant day—the day we were all together. *We had had some right hot weather before that. The day I was in Mr. Kittson's office it was a very hot day.*" "C. Q. 124. Now, what sort of weather was it the day you first saw Mr. Hill and told him you knew of a big thing? A. *It was summer weather.*" "C. Q. 125. Was it a pleasant day? Yes, sir."

As to the order in which the various interviews occurred, and what took place at each, Fisher adheres closely to his direct testimony, going somewhat more into detail.

He says that *before his first talk with Mr. Hill*, "I had had *a good deal of talk* with Mr. Farley about the *First Division* bonds." (372, C. Q. 152:) And plaintiff knew nothing of *these* bonds, could not have had these talks with Fisher about them, till after he became general manager.

As to the occasion of his *first* talk with Mr. Hill, and as to why

he took the scheme to Mr. Hill rather than to any one else he says (374, C. Q. 165:) "We had a good deal of talk with Mr. Hill *about building the Breckenridge cut-off*; in fact, I think we were talking about it *at this time*; * * * and, in talking about the Breckenridge cut-off, Mr. Hill had made the remark a number of times that there was no trouble about their furnishing the money." And (390, C. Q. 374:) "My recollection is—I am not positive about it, but my recollection is—that Mr. Farley was corresponding with Kennedy & Co. about it," (*i. e.* the Breckenridge cut-off.)

(P. 390, C. Q. 375:) "Were these negotiations going on about the time of this first conversation? A. Yes, sir; I think they were."

At this *first* talk with Mr. Hill, Fisher remembers very clearly (369, C. Q. 126) that Mr. Hill, when he came in, took some chewing tobacco from a box on Fisher's desk, and when the proposed "big thing" had been explained to him, he slapped his hand on the table (not on his knee, or on Mr. Fisher's; p. 370, C. Q. 130-2,) and said, "By God, I know where we can get the money."

(P. 373, C. Q. 160:) "You furnished the idea of the scheme to Mr Hill at that time?" A. "I think I did; yes, sir; at least he *didn't intimate that he ever thought of it before.*"

The next interview (the first between Fisher and Messrs Hill and Kittson) was two or three days after that with Mr. Hill. (P. 375, C. Q. 171.) "Mr. Hill told Mr. Kittson about what I had told Mr. Hill, only he said a good deal more; that is, he elaborated on it some." (375, C. Q. 173.)

(P. 375, C. Q. 174:) Did he tell him how many miles of completed road there were of the St. Vincent extension?

A. I think he did; yes, sir.

C. Q. 175. How did that seem to strike Mr. Kittson—with the air of novelty?

A. Mr. Kittson said very little. Mr. Hill done the most of the talking. *I know that I got the impression from Mr. Kittson* at both of these interviews that *he took very little interest in it.*

C. Q. 175½. Did Mr. Kittson say or do anything which led you to think that these things which you were telling him, or that Mr. Hill was telling him, were not at all new to him?

A. No; he didn't seem to enthuse over it. He didn't seem to warm up to it. He said very little, Mr. Kittson did.

C. Q. 176. He didn't say or do anything which led you to think that he knew all about this road—these bonds and everything —long before?

A. *No, sir.*

C. Q. 177. So far as you could judge from his action, appearance, etc., *this was as new to him as it had been to Mr. Hill* when you told it to him.

A. *Yes, sir*; there was nothing said on that point.

C. Q. 178. No; but *that was the inference you drew?*

A. *Yes, sir.*

(C. Q. 179, P. 376:) And you recollect that was the impression you got?

A. That was my impression.

C. Q. 180. At that time?

A. Yes, sir; that was my impression.

The next visit of Mr. Hill and Fisher to Mr. Kittson's office was *about a week* later. Fisher went at Mr. Hill's request. (P. 376, C. Q. 184-6.) This meeting was much like the former one, and Fisher says, (p. 377, C. Q. 196:) "My recollection of the second interview was—it gives me the impression that Mr. Hill was trying to get Mr. Kittson interested, and when I left the office the second time *I felt as if it was a hopeless case. I felt that Mr. Kittson* didn't take *much interest in it.* That was the impression that I had."

The Sunday interview, some days later, at Mr. Kittson's office is gone over minutely on pages 378-384, C. Q. 197, *et seq.* Fisher remains clear in his recollection of the cigar. "Yes, sir; that is pretty clear. Mr. Kittson handed me a cigar that morning. That is my recollection." (378, C. Q. 204-6.) And then Mr. Kittson said (379 Q. 209:) "I wish you would take your time now, and tell me the whole thing," and Fisher accordingly told him what has been already quoted at large. And Fisher says, (398, C. Q. 423:) "I saw Mr. Farley in less than an hour after that."

The residue of Fisher's statements on cross-examination are substantially a repetition of his testimony in chief.

A conversation testified to as having occurred very soon after the final interview at plaintiff's office is germane to the matters then

talked of, and so near in point of time as to be almost part of the *res gestæ*.

Immediately following his account of the making of the agreement, and as part of the same answer, plaintiff says, (p. 74, Q. 88:)

After this interview Mr. Hill saw me daily almost, and had a great deal to say about the future of the enterprise, and a general running talk between him and I lasted for some—possible, weeks. I didn't see Mr. Kittson as often as I saw Mr. Hill, and there was not as much said between him and I as there was between Mr. Hill and I.

Mr. Hill came into my office on one of his daily visits, and said to me that he had been looking round with a view of getting a man to go to Holland—Amsterdam—to stay there and purchase these bonds upon the market as they might be offered. I said to Mr. Hill that that would be very imprudent. I think *at this time* Mr. Hill was aware, too, that the most of these bonds were held by a Dutch committee, and it would be very imprudent to send a man there because, if it was known that there was an American purchaser, the price of the bonds would go up; and that was not the class of bonds we wanted to buy; and that the Dutch committee, upon my information and knowledge, held a very large majority of these bonds * * * and they were the bonds that we wanted to buy to inherit the property—could do it in no other way. At the foreclosure sales the large majority of the bondholders would be the purchasers. A *Mr. John Carp*, who had been in America in 1873, soon after my appointment, *was expected to arrive in St. Paul very soon*, and through him I could ascertain the probabilities of buying this holding of the Dutch committee, in the hands of the Dutch committee. Mr. Hill agreed with me that that was best — to wait till Mr. Carp arrived. Some weeks later than this Mr. Carp did arrive—the month of November, I think it was, 1876.

Fisher's "recollection is" that this conversation took place as stated by plaintiff, and that plaintiff "*had advices then that Mr. Carp was coming.*" P. 382, C. Q. 230. (It may be remarked that this statement of Fisher's was in no way responsive to the question put to him.)

At a later stage of the case, plaintiff, when called by defendants and asked to state what services he rendered to the enterprise, estimates his preventing Mr. Hill from sending a man to Amster-

dam as among the most signal of his services, because that would have been disastrous to the enterprise by putting up the price of bonds 100 per cent. (1416, Q. 291-2; 1418, Q. 300.)

REMARKS ON FOREGOING EVIDENCE.

In this evidence we call attention to the following points:

1. The origin of the enterprise.

In the suits brought by Sahlgard and Stricker to set aside the sales and decrees in the First Div. foreclosure suits, on the ground of an alleged interest of Mr. Kennedy and his partner in the syndicate, Mr. Farley testified for the plaintiff, being examined by Mr. Griffith, the solicitor who brought this suit and its predecessor, and he said: "I *originated* the scheme." (149-152, C. Q. 170-182.)

2. The testimony of Fisher as to the novelty of the idea of such a scheme, both to Mr. Kittson and to Mr. Hill, when it was presented to them; the ignorance and need of instruction which both of them—and especially Mr. Kittson—exhibited in regard to the bonds, their situation and their prices, the mortgages by which they were secured, and the property embraced in the mortgages, and the characteristics of the property—even the length of the several lines.

3. Fisher's testimony that the conversations arose out of a talk about the Breckenridge-Barnes link, which was at that time, as he says, a subject of frequent discussion and correspondence—statements which we shall show to be wholly untrue.

4. Fisher's testimony that Mr. Hill, on being informed of the scheme and instructed as to the property, and the amount and prices of the bonds, caught at it at once, but that Mr. Kittson showed little interest in the project, and great reluctance to engage in it, so that "*when I left the office the second time, I felt as if it was a hopeless case.*" Mr. Kittson's absolute refusal to join, unless plaintiff became a party.

As to all these matters, the defendants prove beyond a question that at this very time Mr. Kittson and Mr. Hill had been for years engaged with Donald A. Smith, in a project, originated by him, for acquiring the property of all these lines. And while, as Fisher says, Mr. Kittson was professing ignorance and seeking light, both

he and Mr. Hill had been for more than two years engaged in informing themselves, and had become fully informed, concerning every one of the matters which Fisher, at Mr. Kittson's request, unfolded to him at the Sunday interview.

And while Mr. Kittson would not go in without plaintiff, he was already engaged in just such a scheme, to which plaintiff was not a party, and into which he had no right to admit plaintiff; a scheme which had progressed so far that the parties to it were already in communication with the Dutch committee; a scheme which Mr. Kittson and Mr. Hill could have had no reason—good or bad—for abandoning, thus throwing over Mr. Kittson's old friend, for the sake of taking up with plaintiff and his scheme.

5. Mr. Kittson's and Mr. Hill's statements that *Mr. Stephen* as well as Mr. Smith would furnish the money, and would get it *through the Bank of Montreal.*

We show that down to May, 1877, when Mr. Hill first met and was introduced to Mr. Stephen, that gentleman was not known to Mr. Hill, at least, except as a manufacturer of blankets. Mr. Hill did not even know that he was connected with the Bank of Montreal. Mr. Smith had never mentioned his name in connection with the scheme—for he had always regarded it with disfavor. And Mr. Hill, Mr. Smith and Mr. Stephen all concur in saying that at no time did they entertain the idea of obtaining any of the money required to buy the Dutch committee's bonds from or through the Bank of Montreal. (Hill, 696, Q. 629; Smith, 1223, R. Q. 33; Stephen, 1244, Q. 115.)

6. Mr. Kittson's certainty that the money, some 4 or 5 millions could be readily obtained, and (7) plaintiff's entire confidence in Mr. Kittson's assurance.

And yet so late as June, 1878, after the bonds had been bought, and after plaintiff had been (as he says) an associate with Messrs. Smith and Stephen for a year or two, and after the four associates had bound themselves to the court to furnish the means to complete the extensions under the order of May 31, 1878—yet even then plaintiff had so little confidence in their ability to raise half a million that he would not undertake the work without the assurance of J. S. Kennedy & Co. that the money should be forthcoming,

and that *they* would "financier the matter." (Defts.' Ex. 94, p. 1019.)

8. That the only purchase contemplated or agreed upon was a purchase *for cash*—the money to be furnished by Messrs. Smith and Stephen, the plaintiff, at least, being expressly exempted from furnishing any, while, so far as appears, all that Messrs. Kittson and Hill were to do in that behalf was to enlist Messrs. Smith and Stephen in the enterprise.

9. The testimony fixing the origin of the scheme and the dates of the conversations.

They were all during warm weather—in summer weather, and the interval between the first of them and the final agreement was about a month. "The day I was in Mr. Kittson's office it was a very hot day." "The day we were in Mr. Farley's office it was before we had commenced to have any fire, but it was cooler; it was a nice cool day." (Fisher, 367-8, C. Q. 116½-118, 122-3.)

"From time to time, running through *a good many weeks*," etc. (Farley, 71, Q. 83.)

Except the calls upon Mr. Kittson, *all* the interviews (including the *first* one—between Mr. Hill and Fisher) were at the general office building of the First Div. Co. "It was the first summer that we were on the First Division. It was after we moved into their general offices. It was *after we moved into that office* and *after we had settled weather.*" (Fisher, 389, C. Q. 368-9.)

And in plaintiff's own latest testimony he says that it was not until sometime after he moved his office "*down* to the building that was occupied by the First Div. Co." that "a running talk commenced." (1372, Q. 91.)

And Fisher's account of Mr. Hill's entering and leaving his office *at the first interview*, and how he "went out of the *building*," compared with his description of his own and plaintiff's offices, show that that interview was in the First Div. building. (Fisher, Q. 85, *supra*, p. 47; Q. 121, Record, 352.)

This building was on the levee, at the foot of Sibley street, "about where the Union depot is now." (Fisher, 352, Q. 120.) From that building to Mr. Kittson's office would be "up." Plaintiff's former office, when he was simply receiver, was in the Music

Hall building, in the upper part of Third street, at the corner of Wabasha street. (52, Q. 17.) Mr. Kittson's office was on Third street, about half way between the other two. (119-120, Q. 351-2.) From the Music Hall to Mr. Kittson's office would be "*down.*"

After Fisher's talk with Mr. Hill, when the latter took him for the *second* talk with Mr. Kittson, he says he went "*up*" to Mr. Kittson's office, and "*down*" from that office to his own. (376, C. Q. 186; 377, C. Q. 195-6.)

And so Mr. Kittson, inviting Fisher to the Sunday conference at his own office, said, "just come *up* there," (343, Q. 95,) and, after that conference was over, "I went *down* to the office, and Mr. Farley was there," etc. (344, Q. 97.)

Now, plaintiff did not take possession of that First Div. office building, did not move his office thither, until some time after March 13th—probably not until Barnes came out, March 27th. (Plff.'s Ex. 41, p 217, Letter of March 11th to Barnes.)

All of these statements of time, place, etc., combine to fix *the first talk* of Fisher with Mr. Hill a considerable time after March 13, 1876. As plaintiff and Fisher were absent inspecting the lines on March 14-17th (*supra* pp. 33-4,) and as Mr. Hill went to Ottawa on the 17th, (768, C. Q. 473,) and returned with Mr. Barnes, on Sunday, March 27th. (Newel, 1323, Q. 23) it is plain that Fisher's *first* talk with him could not have been before Monday, March 28th. And the proof that the *first* talk was not till plaintiff had imparted to Fisher the knowledge of First Div. bonds and their prices, which plaintiff was some weeks in acquiring after he took possession; that *before* that talk Fisher "had a good deal of talk with Mr. Farley about the *First Division bonds*," (372 C. Q. 153;) that after that talk Mr. Hill went directly from Fisher's office into plaintiff's adjoining office, (Fisher, 342, Q. 85; *supra*, p. 47,) and there told plaintiff "that he had some conversation with Mr. Fisher about the price of the St. Paul & Pacific and First Division of the St. Paul and Pacific bonds," (Farley, 71, Q. 83; *supra*, p. 42,) that *at that time* "Mr. Fisher, through me, *was familiar* with the quantity of bonds *on each piece of property*, and about their rated value in Holland," (Id.) and that at the Sunday conference, not long afterwards, on a very hot day, Mr. Kittson spoke of the

improved management—all these things concur to show that Fisher's *first* talk with Mr. Hill could not have been much if any earlier than midsummer.

At the Sunday interview, Mr. Kittson said: "Mr. Farley has made a great change in that property since he has managed it, and we have got great confidence in him." (Fisher, 344, Q. 97.)

"That is the substance of it, that he *noticed a change in the management;* and *my recollection* is that Mr. Kittson also said, 'between you and I, I didn't have much confidence in the former management.'" (Fisher, 397, C. Q. 419.)

Now the Extension lines had never been managed by any one but the receiver. There had been no "former management" of it. When he took possession, it was not ready for the cars and had none. And what plaintiff had done to make a reputation in managing *that* line is shown at pages 28-30, *supra.*

At the final interview "on account of my reputation that had been established here in the management of the property, they both agreed that I should retain the management of it." (Farley, 73, Q. 85.)

Mr. Kittson's reminder to plaintiff that he was "general manager for the trustees in possession," and the manner in which Mr. Farley brings in this piece of testimony. (77, Q. 94-6.)

This was considered as not quite a safe statement, and so Fisher, (testifying a month after plaintiff) puts the interview prior to Oct. 9, 1876, when the trustees took possession. (368, C. Q. 118.)

When the defendants' evidence (including plaintiff's own letters) had driven plaintiff to find new dates for these interviews, and he had put them prior to June 3, 1876, he tries to explain away this testimony. (1365-6, Q. 66-8.) But he had learned the story so well that he can't get it out of his mind. (1397, Q. 208.)

And plaintiff's testimony (77, Q. 96) as to the relations between the stockholders and bondholders—"Here are the Litchfields, and Mr. Becker, and Mr. Bigelow, fighting for the possession of the property," and Fisher's statement—"If Becker knew what was going on, he would move heaven and earth to get you out of here." (348, Q. 100)—show that this final interview could not have taken place during the subsistence of amicable relations under the Litch-

field agreement, nor until hostilities had been renewed, on Oct. 9, 1876, by the trustees' seizure of the lines.

The testimony is full and minute. The incidents narrated, snatches of conversations, description of the weather, etc., while they give certainty and particularity and an air of probability to the narrative, as a narrative of negotiations in the summer and autumn, must be regarded as mere inventions if the final agreement was made before June 3d. In the story as told by the witnesses, the dates and the statements fixing the dates cannot be changed and the integrity of the story be preserved.

And when plaintiff and Fisher afterwards come in and say that all these talks were prior to June 3d, there arise these questions, which they have not attempted to answer: Why did Farley state that Mr. Kittson referred to the trustees in possession? Why did Fisher say that the Sunday with Mr. Kittson was a very hot day, and the weather grew cooler till the final interview, when it was, however, not cold enough for a fire? Did they remember these things, or did they invent them?

If plaintiff and Fisher or any one else with their limited knowledge of the facts were going to invent a story as to such an agreement between plaintiff and Messrs. Kittson and Hill, they would be obliged to place the transactions at a date late enough after plaintiff's becoming general manager (March 13, 1876,) to enable him to acquire that knowledge of the affairs of the First Div. Co. which up to that time he certainly did not possess.

And as the agreement must thus be placed at least as late as the early autumn, so it would have to be placed before winter. On January 29, 1877, Messrs. Kittson and Hill wrote to Mr. Carp a letter making an offer for the First Div. lines, which begins: "Referring to our interview with you in regard to the purchase of the First Division," etc. (Ex. E to Carp's deposition for plff., p. 529.)

Plaintiff knew that Carp had been in St. Paul in December, 1876, and that negotiations had then been had between him and Messrs. Kittson and Hill. And he knew that if it appeared that he did not originate the scheme, and especially if Messrs. Kittson and Hill

were shown to be in communication with the Dutch committee before the date of his alleged agreement with them, this would be fatal to his case.

And it would greatly help his case if it should appear that upon the making of the agreement he at once placed Messrs. Kittson and Hill in communication with the committee. He had in his possession Kennedy & Co.'s letter of Nov. 15, 1876, (Plff.'s Ex. 104, p. 263,) in which they write: "Mr. Carp arrived from Holland this morning, and may possibly pay you a visit at St. Paul before he returns to his home," and (what becomes extremely important after plaintiff's change in the dates) this is *the earliest date* at which any knowledge or expectation of Mr. Carp's coming is or can be fixed. He had Mr. Kennedy's letter of Nov. 25, 1878, (Plff.'s Ex. 106, p. 265,) saying in the postscript, "Mr. Carp arrived here last week, and started for St. Paul this morning."

And to fit these letters and the fact of Mr. Carp's visit and negotiation, plaintiff and Fisher have not only located the interviews at dates and added embellishments which they concede at last to be not only false but impossible, but these letters and the visit undoubtedly suggested the invention of the wholly fictitious story about Mr. Hill's desire to send a man to Amsterdam to buy outstanding bonds, and plaintiff's saving the enterprise from ruin by pointing out the disaster certain to follow such a course. When plaintiff and Fisher put the agreement earlier than June 3d, among other disasters to their case is an exposure of the falsity of this whole story.

The plaintiff further attempted to give plausibility to his story and his dates, by trying, on cross-examination of Sir Donald Smith, to show that he was or might have been in St. Paul in October, 1876, and that he and Mr. Stephen might have met Mr. Hill during his visit to the Centennial Exposition in that month. (Smith, 1185-6, C. Q. 191-202; Stephen, 1265, C. Q. 9-10.)

Sir Donald (1185, C. Q. 191-2) could not then recollect as to his being in St. Paul. But the defendants' counsel gave plaintiff all the aid they could by having Sir Donald refresh his recollection during an adjournment, as a result of which he was able to state on

his redirect examination (1218, R. Q. 20) that he *was* in St. Paul in September and in October, 1876.

This question whether plaintiff originated the scheme, and whether the agreement was made before Messrs. Hill and Kittson had, at the instance of Mr. Smith, opened communication with the representatives of the Dutch committee, is the vital question in the case, and was so treated throughout the taking of the testimony, as appears very clearly by the cross-examination of the defendants' witnesses. And it was rightly so treated. It would be in the last degree improbable that Messrs. Kittson and Hill, engaged with Donald A. Smith in a project of *his* devising, and in which they had a reasonable hope of becoming participants, a project in which they had been occupied for two years, and which had been brought to such a point that, with Mr. Smith's concurrence, a meeting had been sought and had with the agents of the Dutch committee—it is in the last degree improbable that after all this Messrs. Kittson and Hill should consent to an alliance with plaintiff, either by admitting him into Mr. Smith's enterprise or by joining an opposition scheme of his devising. They *could not* admit plaintiff into Mr Smith's scheme. And it is simply impossible that with Mr. Kittson's long and intimate friendship with Mr. Smith, he and Mr. Hill should throw over Mr. Smith and his plan, and join plaintiff and his scheme, into which Mr. Smith was to be admitted on terms —and on the best terms that he could be induced or compelled to accept.

Aside from any questions of honor and friendship, what had they to gain? Had plaintiff knowledge of the property, the indebtedness and the "rated value" of the bonds? They knew all that he did, and more, in regard to everything that needed to be known. In the autumn of 1876, Mr. Farley, with six months' experience as general manager, might have known a little more about matters of detail—matters, however, of which he would know less than the master mechanic or the road-master. But these were not the matters on which far-seeing business men would rely in buying a land-grant railroad in a new country. The quantity of the grant was fixed by law, and the probable quantity of land that would be realized could

be estimated with sufficient accuracy from the public records and the published reports of lands actually received and sold, and the extent of settlement already made along the lines. The bulk of the railroad property was visible to the eye. And the sellers would of course furnish whatever information the company's records afforded. The great element of value is well stated by Mr. Kennedy in his deposition in the Sahlgard case, put in evidence by plaintiff, (1744, Q. 16:) "The real intrinsic value of a railroad depends upon its earning capacity, which comes from its having a large traffic, and having the means with which to carry on that traffic." And the value of lines like these, in a new country, must be to a great extent prospective. That is the theory on which they are endowed with land grants. The value of these lines depended, above all else, on the character of the country they traversed, and the probability of its settlement and cultivation. Of all this the others could judge as well as plaintiff and better.

Neither Mr. Kittson nor Mr. Hill needed to go to school to Fisher as a tutor for Sunday lessons on any of these things.

Was plaintiff aware that the bonds were held by the Dutch committee? So were they and each of them. Did he know Mr. Carp, and so knew how to reach the committee? It will not be seriously contended that men with money in hand to buy bonds would pay any such price for an introduction to the seller. Did plaintiff have influence with Mr. Carp, so that his assurance of Messrs. Kittson and Hill's ability to raise the money would secure for their propositions Mr. Carp's favorable consideration? He says over and over again that this was so, and that without his assurance of such ability the propositions would not have been entertained. But what is the fact? His assurances were as nothing. In their negotiations in December, 1876, and their letter of Jan. 29, 1877, Messrs. Hill and Kittson did not mention Mr. Smith's name, for they had no authority to do so, as the proposition was not within his enterprise. They did not mention Mr. Stephen's name, for they did not know him in connection with *any* enterprise relating to the bonds. But plaintiff says *he* told Mr. Carp of their financial ability. And what was the effect on Mr. Carp? Mr. Barnes' letter of Feb. 6,

1877, (Plff.'s Ex. 115, p. 277,) shows that Mr. Carp, notwithstanding plaintiff's assurances, did not have confidence enough in Messrs. Kittson and Hill's financial ability to lay the proposition before the committee, and it never reached them. But when the time came for Messrs. Kittson and Hill to address to the committee a letter for which they desired and which did receive consideration, it was only necessary for them to mention in it that they had made arrangements for funds "with George Stephen, Esq., president of the Bank of Montreal, and the Honorable Donald A. Smith, commissioner of the Hudson's Bay Company." (Letter of May 26, 1877, p. 533.)

The eminence of these gentlemen, not merely in Montreal and London, but in New York, and that "they enjoy, personally and as men of business, the very highest reputation for integrity and capacity, and in financial circles are regarded as men who will not embark in undertakings which they are not able entirely to carry out," is stated in the report of Gov. Reynolds to the circuit court, put in evidence by plaintiff. (Plff.'s Ex. 203, pp. 417-8.)

These and not Mr. Farley's were names to conjure with,—were the "open sesame" to the deliberations of the Amsterdam bankers and the vaults of the Associatie Cassa.

But plaintiff had judgment and skill as a negotiator. He could tell how much ought to be paid for the bonds, and what should be done to secure them, and how the company should be reorganized.

Even had Messrs. Kittson and Hill been as infantile in their knowledge and experience of affairs as Mr. Farley would make them out, still the president of the largest bank and the then greatest financial institution of any kind on this continent, and the chief officer of the oldest and the largest trading company in the world, needed not to go to school to plaintiff in matters of negotiation or finance, or the reorganization of railway companies, or the placing of their securities. So far as the pending foreclosure suits were concerned, they and their Minnesota associates could demand the opinions and services of lawyers more competent than Mr. Farley. And whoever heard of the projectors of a great railway purchase making their enterprise conditional on their prevailing on any man

to take charge of its operation and take one-fifth of the property as a bonus for doing so?

And, if as plaintiff says, he told them that Kennedy & Co. were indispensable and must be bought, and were purchasable though expensive, they would naturally deal with the masters and not with the man.

THIRD.

THE TRUE ORIGIN AND HISTORY OF THE ENTERPRISE, AND HEREIN:

1. MESSRS. KITTSON AND HILL'S KNOWLEDGE OF THE PROPERTY, ETC., PRIOR TO 1874.

2. ORIGIN AND HISTORY OF THE ENTERPRISE DOWN TO THE TIME OF PLAINTIFF'S ALLEGED INVENTION OF IT.

Mr. Kittson's long career in Minnesota, (beginning in 1834,) as sketched by a competent hand, the plaintiff's counsel have themselves brought before the court. (706, C. Q. 64.)

Mr. Hill became a resident of the state in 1856, when but 18 years old, and in that and the following year was employed as a clerk in the loading and discharge of steamboats at the levee in St. Paul. At that time the trade between St. Paul and the Red River country was carried on by means of the wooden carts familiar to the old residents of the city. This trade, at least, after 1859, was of two classes: (1) that of the Hudson's Bay Co,, and (2) that of the "free traders." In 1861 or 1862, Mr. Kittson, who had acted for the free traders in St. Paul, became also agent for the Hudson's Bay Co., (a position he held till 1878,) and, during 1863 4, Mr. Hill conducted his business for him, in his absence. In 1866, Mr. Kittson turned over to Mr. Hill his agency for the free traders, finding it incompatible with his relations with the Hudson's Bay Co. This agency involved the charge of the transportation of their exports (furs and skins) and of their imports from England, and the filling of their orders for supplies of all kinds. (Hill, 557-9, Q. 1-14.)

The Branch line was completed to St. Cloud in 1867.

In 1870 Mr. Hill first visited the Red River country, going by rail to St. Cloud, thence westward by stage 100 miles to Burns station, and thence by dog train to Pembina and Fort Garry.

The route followed substantially the line of the St. Vincent

extension, but crossing the Red River at Georgetown and then following the west bank. (559-560, Q. 18-21.)

This is the same route described by Sir Donald Smith and followed by him before the Northern Pacific railroad was opened to Moorhead. (1125, Q. 6-8.)

Mr. Kittson resided at Pembina from 1843 to 1854, making trips from time to time between that place and St. Paul. (Hill, 707, C. Q. 64.)

It does not appear that up to 1860 Mr. Kittson had been or that he ever became a "practical steamboat man," any more than he became a "practical railroad man"—a point so much insisted on by plaintiff's counsel. Nevertheless, in 1860, he established a line of steamboats and barges on the Red River known as "Kittson's line."

Mr. Hill, too, in 1870, began operating a line of flat boats on the river, and in the following winter (1870-1) built a steamboat at Fort Abercrombie, which was operated in the summer of 1871, by his firm, Hill, Griggs & Co., Mr. Hill personally managing the business. In the fall of 1870 he made several trips by wagon through the valley, and in the summer of 1871 he passed a great deal of time along the line between St, Paul and Winnipeg, attending to the transportation of freight and passengers. (Hill, 560, Q. 23-4.)

While operating this boat, Mr. Hill opened a through line to Winnipeg, making a through tariff, which was largely distributed on the lines between St. Paul and Canada. (565, Q. 44; 725, C. Q. 195-6.).

In 1872 a joint traffic arrangement was made between the two lines, and at the close of that year Mr. Kittson and Mr. Hill bought the interest of Hill, Griggs & Co. in their boat and barges, and they were run under this ownership until February, 1874, when the Red River Transportation Co. was organized, of which Messrs. Kittson and Hill owned most of the stock. (560, Q. 24; 713, C. Q. 109, 111; Plff's Ex. 242, p. 1732. Articles of Inc. Red River Trans. Co.)

Of this company Mr. Kittson was general manager, and its busi-

ness was conducted by him in concert with Mr. Hill down to 1878.

Plaintiff (139, C. Q. 110) tries to make it appear that Mr. Hill "had nothing to do with the management of the business;" but on this point see Hill 561, Q. 25; 725, C. Q. 196. And plaintiff's counsel have clearly brought out Mr. Hill's visits to Canada to obtain contracts and on other business for the company.

The Hudson's Bay Co. and its officials had a considerable interest in the Transportation Co., held for them at one time by Mr. Kittson, and at another by Mr. Grahame, their "trade commissioner." (Hill, 526, Q. 91; 715, C. Q. 121-3; Smith, 1136, Q. 55-6.)

A competing line of steamers ran for the single year 1875 or 1876, and then became insolvent, and its boats were bought by Messrs. Kittson and Hill's company. (Hill, 562, Q. 28; 717-8, C. Q. 140-4.)

Before operating the steamboat line on the Red River, Mr. Hill had obtained from the First Div. Co. a contract under which he handled all that company's freight at St. Paul, its principal station, at a certain price per ton. The terms of this contract were agreed on in 1866, (about the time of the completion of the Branch line to St. Cloud) between Mr. Hill and Mr. Delano, the then superintendent.

In this business Mr. Hill at first had as a partner, Mr. Egbert Litchfield, a half-brother of Messrs. E. C. and E. D. Litchfield, who were owners of the stock of the First Div. Co.

This contract continued in operation until abrogated by Mr. Farley in the spring of 1876, prior to May 8th, and soon after he became general manager *for the company*. (Hill, 562-4, Q. 35-43; 719, C. Q. 150; Farley, 139-140, C. Q. 111-3; Plff.'s Ex 47, p 221.)

Besides this contract for freight handling, Mr. Hill had a contract with the First Div. Co. for the wood traffic on the Main line, (including the wood supplies for the company,) which furnished the company with about 30 per cent. of its entire freight earnings. (Hill, 564-5, Q. 44-6; 720-1, C. Q. 156-163.)

This contract, also, was abrogated by plaintiff prior to May 8, 1876. (Plff's Ex 47, p. 221.)

In Exhibits 50 and 57, pp. 223, 228, plaintiff gives his employers his opinion of the wood furnished under this contract.

In the bill of complaint in the suit in which plaintiff was appointed receiver, this contract is mentioned as one of the grievances of the bondholders. (Defts.' Ex. 5, p. 856.)

The relations of Mr. Kittson and Mr. Hill with the management of the First Div. Co. were (unlike those of plaintiff) friendly and intimate. In January, 1874, they were both associated with Mr. Becker and Mr. Delano in the organization of the Western R. R. Co., (Plff.'s Ex. 241, p. 730,) and when they caused the Red River Valley R. R. Co. to be organized, in June, 1875, they made Mr. Becker a stockholder and director. (Deft.s' Ex. 6, pp. 905-7.)

And plaintiff (140, C. Q. 116-7,) says: "I know there was a great deal said by the public that Mr. Hill had privileges from the management of the First Div. Co. that nobody else could get."

In his direct examination, to make out that Mr. Hill was not a "practical railroad man," and knew nothing of the transportation business, plaintiff says that in 1873-5, Mr. Hill "was in the fuel business, buying and selling wood and coal, in the market here at St. Paul. *I don't know any other business that he was engaged in; he might have been.*" (118, Q. 348.)

And it was only on cross examination, (139, C. Q. 110, 111,) that he will acknowledge the freight-handling contract, and (C. Q. 116) the wood contract. And he shows his ignorance of First Div. Co. matters prior to his becoming general manager, by saying that, on taking possession, "*for the first time* I learned that Mr. Hill was doing that business there. * * * To the best of my recollection, it was the first intimation I had that he had anything to do with it."

Besides his connection with the Red River lines of steamboats and with the First Div. Co., Mr. Hill and his firm were large dealers in wood and coal.

Long before 1876 Mr. Kittson and Mr. Hill had become well acquainted with Mr. (now Sir) Donald A. Smith.

As to Mr. Kittson, Sir Donald says that he "knew him intimately and respected him very much" (1179, C. Q. 151. And see 1152, Q. 111.)

Mr. Smith first met Mr. Hill on the prairie near Elm river, in March, 1870. He was coming from Ft. Garry (now Winnipeg)

with a dog train, and Mr. Hill was going thither by the same mode of travelling. (Smith, 1132, Q. 36; Hill, 559, Q. 18; 710, C. Q. 86.)

Mr. Smith, as well as Mr. Kittson and Mr. Hill, had been, for several years prior to 1873, familiar with the country traversed by the Main and Branch lines of the First Div. Co., and by the St. Vincent extension, and with the progress made by those lines while in course of construction. He, even more than they, must have been familiar with Manitoba, its population, development, productive capacity, prospective trade, etc. (1124-6, Q. 1-12; 1143-4, Q. 83-9.)

ORIGIN OF THE ENTERPRISE OF ACQUIRING THE BONDS AND PROPERTY FO THE TWO COMPANIES, AND HISTORY OF THE ENTERPRISE DOWN TO THE TIME WHEN, PLAINTIFF SAYS, "I ORIGINATED THE SCHEME."

As the basis of this narrative we shall take the testimony of Mr. Hill, pointing out how it is corroborated, *at all points*, by the testimony of witnesses of the highest standing in character, capacity, and public estimation.

In the fall of 1872, Mr. Smith learned, as did every one else interested in the completion of the Extension lines, that work on those lines had stopped, and it needed little if any inquiry to inform him of the cause of the stoppage—failure to pay De Graff & Co., the contractors.

At a date which Mr. Hill in his direct examination (569, Q. 63) places as "in the fall of 1873, or possibly as late as the commencement of 1874," and in his cross examination, according to his best judgment, as "somewhere between the last of November, 1873, and the first of the year 1874," (734, C. Q. 255-6,) Mr. Smith was passing through St. Paul, and either requested Mr. Kittson and Mr. Hill, or made to Mr. Kittson a request which the latter communicated to Mr. Hill, (on this point Mr. Hill is not certain,) for information concerning the railroads, land grant, equipment, and other property, and as to the bonded debt, of the St. Paul & Pacific Co. and of the First Div. Co.

The first step taken by Mr. Hill was to confer with Mr. Delano, who had long been connected with the First Div. Co. as superintendent and director, and was well acquainted with its property.

Mr. Delano suggested that it would be better to begin with the acquisition of the Branch line, with its valuable St. Paul terminals, after which the Main line and extensions could be more easily obtained; but this suggestion was not well received, Mr. Smith not being favorable to any project that did not include the St. Vincent extension; for it was the importance to Manitoba, and to the Hudson's Bay Co., and to the Dominion, of the completion of this extension, which had first caused him to direct his attention to the acquisition of the property as a step towards the completion of the lines.

Mr. Delano, though perhaps less minutely acquainted with the condition of the work on the Extension lines than he was with the First Div. Co. lines of which he had long been superintendent, and probably not so well acquainted as Mr. Smith, Mr. Kittson, and Mr. Hill with the country traversed by the St. Vincent extension, was of course acquainted with its bonded debt. The bonds were issued by his own company. He had been present on behalf of the First Div. Co., at the argument of the motion for a receiver before Judge Dillon, in July, 1873. Telegraphic correspondence produced at that hearing to show the deposit of bonds with the Dutch committee, and J. S. Kennedy & Co.'s agency to represent them, together with extracts from an affidavit sworn to by Mr. Willmar before Judge Dillon, July 30, 1873, are reproduced in Mr. Delano's speech of Feb. 23, 1875. (Defts.' Ex. 120, pp. 1273, 1289, 1291; Hill, 572, Q. 73-4.) And in the affidavits of John S. Barnes and Leon Willmar, in support of the motion, the formation and holdings of the committee, and the agency of Kennedy & Co , are also set forth, while the bill of complaint states the indebtedness of both companies. (Defts.' Ex. 5, pp. 842-8, 870, *et seq.*)

Willmar's affidavit also states that 4,270 bonds are held by Lippmann, Rosenthal & Co., as security for an advance of $900,000. (Defts.' Ex. 5, p. 873.)

And however the information may have been procured, Mr. Smith says that "Either in the fall of 1873, or very early in 1874, I came to know that they (the mortgage bonds of the extension line) were held principally in Holland by Dutchmen, known as the Dutch committee, I think." (1129, Q. 17.)

The statement thus made up was handed to Mr. Kittson, to await Mr. Smith's again passing through St. Paul. On cross-examination (738, Q. 286,) Mr. Hill describes it as containing more than ten pages. (Hill. 569-572, Q. 63-74; 733-741, C. Q. 251-300.)

On cross-examination (741, Q. 301) Mr. Hill places his conference with Mr. Delano at a date prior to the organization of the Western R. R. Co., which was formed Jan. 29-31, 1874. (Plff's Ex. 241, p. 1730.)

Sir Donald Smith testifies (1127, Q. 13, and 1158, C. Q. 32 4) that prior to this request for information he had had communications with John Carp as to the completion of the extension to St. Vincent. (And see Carp's Report of 1873, p. 471.)

He also says that he talked over with Mr. Kittson the likelihood of the road being completed by those who then controlled it, and became satisfied they would not complete it, and "it was only after that that I came seriously to think of acquiring the road so as to have it completed," and as Mr. Kittson was the Hudson's Bay Company's agent, and to some extent acting under his instructions, and as he understood Mr. Kittson was in position to get information from Mr. Delano and other sources, he asked Mr. Kittson in the fall of 1873, at St. Paul, to get him such information as could readily be obtained. (1127.)

Early in the winter of 1874, Mr. Smith, being again in St. Paul, met Mr. Delano with Mr. Kittson, and the statements which Mr. Delano had aided in preparing, were delivered to him by Mr. Kittson, and discussed by him with Mr. Kittson and Mr. Delano.

At that time Mr. Smith's feeling was that:

"Failing to get the road through in any other way, I should have been glad to induce others along with myself to take it up, if it could be got upon such terms as these gentlemen thought it could be obtained. The stock was looked upon as almost valueless, and that there would be no great difficulty in acquiring it; then it was to get the bonds—a majority or controlling interest of the bonds—on the best terms upon which they could be got, which I believed would be at a very low price." (1130-1, Q. 28-9.)

In view of plaintiff's and Fisher's testimony as to Mr. Kittson's ignorance of the property and need of enlightenment in the summer of 1876, and the great difficulty of interesting him in the

scheme (—"I felt as if it was a hopeless case;" Fisher, 377, C. Q. 196—), it is interesting to see how he looked at the scheme early in 1874:

"Mr. Kittson showed that he took a very warm interest in it, and he was of the opinion that it would be a very profitable thing indeed, if the road could be acquired on anything like the terms that they thought it probably could be got for." (Smith, 1131, Q. 30.)

And during 1874 and 1875, Mr. Kittson's views as to "the desirability of carrying out the idea of acquiring these properties by means of the bonds" were: "He thought it was very desirable to do so, if possible, and that it was feasible, too." (1132, Q. 35.)

Asked on cross-examination, (1174 C. Q. 118,) whether Mr. Kittson, early in 1874, was as favorably impressed as himself with the desirability of procuring the railroad property, Sir Donald Smith says: "After he had looked into the matter closely, I believe he was equally favorably impressed with it as I."

And on the vital question, whether this project originated with plaintiff, in 1876, and was first an enterprise of himself and Messrs. Hill and Kittson, into which Messrs. Smith and Stephen were afterwards admitted, Sir Donald Smith testifies, (p. 1147, Q. 96:)

"I considered the idea of acquiring the road originated with myself, and that it was at my instance, in 1873 and early in 1874, that Mr. Kittson acted in getting all the information he possibly could with regard to the road and the bonds and the possibility of acquiring them. It was in no sense the proposition of Mr. Kittson and Mr. Hill in the first instance; but after making the inquiries referred to, Mr. Kittson himself was so fully impressed with the value of the property that he was then not less anxious than I that it should be obtained."

And it will be seen that the subsequent agreements between Messrs. Stephen, Smith, Kittson and Hill were on the basis *not* of the admission of Mr. Smith into an enterprise of Messrs. Kittson and Hill, but of *their* admission into his enterprise, with the share in it which he and Mr. Stephen allotted to them. (Smith, 1142, Q. 82; 1149, Q. 102; 1190-1, C. Q. 228-232. Stephen 1239-1240, Q. 90-95.)

It is not claimed that so early as January, 1874, this enterprise was complete in all its details. But the project was there, and it

will be shown that it was diligently pursued until the opportune time came to carry it out.

And, as remarked by Justice Brewer, (1778), the plaintiff does not pretend that when the alleged agreement in suit was made any *definite plan* was agreed upon.

History of the Enterprise During the Years 1874 and 1875.

From the time that the idea of acquiring these properties had been suggested to him by Mr. Smith, Mr. Hill pursued it with tireless energy and zeal. He was fully committed to it, in "the hope that, through that connection, I would be able ultimately to be interested in the property with Mr. Kittson and Mr. Smith." (765, C. Q. 464.)

As early as February, 1874, he spoke to Stanford Newel, Esq., in regard to the work he was engaged in, of getting information for Gov. Smith. Mr. Newel is able to and does fix this date by that of his own return from Europe. (1317, Q. 9.)

From that time on Mr. Newel and Mr. Hill, who were intimate friends, met daily when they were both in the city—

"And this matter was the topic of conversation. It became from day to day an all-absorbing subject with him. I used to tell him he was getting it upon the brain. He thought of nothing else, and the object he had in view was the acquisition of those properties. * * * He was positive through it all—hopeful—that through Gov. Smith, a party, of which he himself would be one, would succeed in acquiring those bonds. * * * I was not the only person with whom Mr. Hill talked upon the subject. He seemed determined to exhaust every means of acquiring knowledge on the subject." (Newel, 1318-9, Q. 11.)

And on cross examination, (pp. 1327-8:)

C. Q. 3. Can you fix any date within the first half of the year 1874, upon which, or very near to which, Mr. Hill definitely stated to you what his plan and purpose was with reference to the property of said two railroads?

A. I think his plan was always definite to acquire the bonds and the property of those two roads. He always had that definite plan —the acquisition of those properties.

C. Q. 4. Do you mean to say that Mr. Hill expressly so stated to you at any time during the year 1874?

A. *Why, certainly I do.*

C. Q. 5. Now give his words or language as nearly as you can in that behalf.

A. I do not know as I can give his words or language. They were conversations that extended through the year, and, as I have stated in my direct examination, when I was in town and he was in town they were of almost daily occurrence.

C. Q. 6. They was of almost daily occurence from what date to what date?

A. Well, from February, 1874, on while I was in town, at such times as we were both in the city. I was out of the city at times, and so was he.

These and other conversations between Mr. Newel are elegantly styled by plaintiff in his later testimony: "babbling about it as he did to Sanford Newel." (1352, Q. 17.)

Mr. Newel at Mr. Hill's request made some examinations of papers in the foreclosure suits, but until the firm of Young & Newel was formed, in April, 1875, he could not get *printed copies* of such papers. (Newel, 1342, C. Q. 92.)

In the spring of 1875, Mr. Newel proposed to Mr. Young, who had been for a time a judge of the supreme court of Minnesota, to remove to St. Paul and form a law partnership with him Mr. Newel's object in view, and the inducement held out to Mr. Young, was the large prospective law business likely to result from "this project of Mr. Hill's for the acquisition of those (railroad) properties." (Newel, 1319-1320, Q. 12-16.)

The partnership was formed in April, 1875, their office being in the old two story brick building, then standing at the corner of Third and Minnesota street, directly over Mr. Hill's office in the same building. (Id. 1317, 1320, Q. 6, 16.)

Mr. Young had sat in the supreme court at the October term, 1874, when the appeals from the order of the common pleas refusing a receiver for the Main and the Branch line were argued in that court. (Bigelow, 1691, C. Q. 5.) He brought with him the printed copies of the record, including the pleadings and affidavits on both sides, and a printed copy of the mortgages. (Newel, 1320-1, Q. 18; 1339-1340, C. Q. 76-8.)

All these books were shown to Mr. Hill immediately after they were brought to the office, and their contents were discussed with him on many occasions throughout the year 1875. (Id. 1321-2, Q. 19.)

These printed pleadings and affidavits are Defendants' Exhibits 133-8. An index to and abstract of their contents, with extracts therefrom, are by stipulation printed at pages 1790-1803, in lieu of the originals. They contain all the information in regard to the First Division property, including its land grant, and in regard to its income, expenses, and future prospects, which able and fully-informed counsel could present on the question, whether or not the property was or was likely to be sufficient security for the debts and interest, whether it was and would be properly managed, and whether a receiver should be appointed.

At page 1794, in the affidavit of John H. Kloos is a statement of the formation of the Dutch committee and the names of all its members, and on page 1794 a statement of the last quoted prices for the bonds. In the complaint, (1792-3,) is contained a statement of the bonds and stock outstanding, and the ownership of the stock; and Mr. Becker's affidavit, (1797,) contains additional information on these points, as does also the rebutting affidavit of Mr. Kloos, (1795-6.) Plaintiff also makes oath (1793-4) to the condition of the lines and his own knowledge and experience in railroad construction, his statements being, however, controverted by Mr. Sewall, Mr. Dudley, Mr. Morris, Mr. Delano and Mr. Cavender. (1798-9).

Similar printed books had been previously referred to in the examination of Mr. Galusha, in May, 1888, and plaintiff's counsel had cross-examined him, on the assumption that no such printed books existed *prior to 1876*. (1063, C. Q. 57-61).

Prior to this time Mr. Hill had made himself acquainted with the printed bill of complaint (840,) exhibits and affidavits (870) in the suit by J. S. Kennedy &Co., in the circuit court, in which plaintiff was appointed receiver, and the store of information therein contained, a copy of the $15,000,000 mortgage (881) being part of the bill. And he obtained and had a printed copy of these papers. (578, Q. 96)

He had also examined in the office of the clerk of the circuit court the powers of attorney from the Dutch Committee and from Lippmann, Rosenthal & Co. to John S. Kennedy (Defts.' Ex. 3 and 4, pp. 831, 834,) in which the numbers of each of the 4,325 bonds of the $15,000,000 issue held by Lippmann, Rosenthal & Co., and of each of the 6,977 bonds held by the committe, are scheduled. (577, Q. 94-6.)

And in regard to the contents of this bill of complaint—especially the prayer for relief, that it asked a foreclosure of the $15,000,000 mortgage and a receiver for *both* companies (859)—Mr. Hill seems better acquainted than plaintiff or his counsel, if we may judge from the last paragraph of subdivision III of the bill, and Q. 374-378, put to him on his cross examination, on pages 751-2.

Mr. Hill, in 1874, also obtained a printed pamphlet containing copies of all the mortgages on the First Div. Lines. (761-2, C. Q. 438-441.)

On Mr. Hill's redirect examination (825-6, R. Q. 3,) a copy of the same pamphlet, bearing the imprint "1873," was introduced in evidence by the defendants.

Plaintiff's counsel, so late as July, 1888, could not believe that any such book had been printed prior to 1876, (which shows how much their client knew about the sources of information open to Mr. Hill,) and spent much time in a fruitless cross-examination of Mr. Hill, Mr. Upham, and Mr. Newel on this point.

(Hill, 828-9, R. C. Q. 1-5; Newel, 1342-3, C. Q. 93-105.)

But at length, having called Mr. Bigelow, in October, 1888, to prove that the book was *not* printed prior to 1876—in other words, that the defendants were imposing on the court a book with a false date, gotten up by them for the purpose—the plaintiff's counsel got convincing proof that the book was in fact printed in 1873, and was used in the arguments in the supreme court for a receivership of the First Division in 1874, when Mr. Young was a member of the court. (1688-1691.)

Mr. Henry P. Upham also testifies that from a date anterior to May 2, 1874, down to the time of the sales under the foreclosure decrees, he heard Mr. Hill constantly speak of the project for acquiring the properties. He says (1073, Q. 18.)

"It was a matter that he incessantly talked to me about from early in 1874 to the time of the foreclosure—probably several hundred times. I was his confidential friend; he used to inform me of the different steps in these negotiations,—that is, of his progress in them," etc.

And he fixes the date May 2, 1874, (before which the conversations began) by the removal of the Minnesota Club from its old club-house on 8th street. (1073, Q. 18, 19.)

At the old club house, and prior to May 2, 1874, Mr. Upham, on one occasion, talked with Mr. Hill and Mr. Kittson a few moments about this railroad project, and this conversation was continued a long time between Mr. Hill and Mr. Kittson, the former being the principal speaker. (1083, C. Q. 22-4.)

In C. Q. 26, p. 1084, plaintiff's counsel in his question assumes that Mr. Kittson then indicated to Mr. Upham "that he thought little of what Mr. Hill was endeavoring to impress him with," which is a mere assumption. Sir Donald Smith's testimony on this point has already been quoted. Mr. Kittson was already deeply interested, and he had already the information gathered by Mr. Hill in addition to his own full acquaintance with the country, etc. He was an older man than Mr. Hill, and doubtless his mind was not so fully occupied as was Mr. Hill's with this project, and he may have been wearied, perhaps annoyed, at Mr. Hill's detaining him so long going over what he already knew, at a club-house to which he had doubtless come for social amusement rather than business talk.

And so with the repeated questions to Mr. Upham as to when Mr. Kittson showed that he had "entered seriously upon the business," (1085, C. Q. 32-3; 1088, C. Q. 56; 1089, C. Q. 62;) or when Mr. Upham's conversations with them "took a serious character, such as would show that those two gentlemen *had engaged* and *agreed with each other* to enter upon and proceed with the project of buying the property and bonds of said two named railroad companies." (1085, C. Q. 30.)

This examination was on May 9, 1888, before it had been conclusively shown by the testimony of Sir Donald Smith (corroborating Mr. Hill) that the project was *his* project, to be pursued as and when *he* should direct, and that Messrs. Kittson and Hill were

merely acting as his aids in whatever they did by way of furnishing information or suggestions. And it would have been absurd for Mr. Kittson or Mr. Hill to "engage" or "agree with each other to enter upon and proceed with the project"—which was not theirs, but Mr. Smith's. Plaintiff's case requires that after Mr. Farley, through Mr. Fisher, suggested the scheme to Mr. Hill, the latter must have labored with Mr. Kittson to undertake it, who, however, will not be induced to do so till Mr. Farley's invaluable co-operation can be secured, and then, *presto*, an agreement is formed dividing the profits, before any plan for getting the bonds is even spoken of, before it is known that the one indispensable thing—the money—can be had, before it is known whether the bonds can be bought at a price that would render the enterprise possible, or at all. The gentlemen who did make agreements with each other, and who did, without Mr. Farley's or Mr. Fisher's aid, conceive and execute this great enterprise, committed no such childish follies. They first ascertained whether the bonds could be bought and at what price, and satisfied themselves that the enterprise was practicable, and they then agreed among themselves, not in mere talk, but by formal written contracts, not merely how the profits should be divided, but what each should do towards realizing these profits.

And the defendants do not claim either in the pleadings or on the evidence that Messrs. Hill and Kittson ever made any "engagement" or "agreement" with each other or with Sir Donald Smith (other than their agreement to procure information for him) until the agreement for association in buying the bonds was made between these three gentlemen and Sir George Stephen.

In regard to these conversations with Mr. Hill in 1874 and 1875, and what Mr. Hill's plans and hopes then were, Mr. Upham further testifies on pages 1073-5, Q. 20-24; 1078-9, 1080, Q. 43-47, Q. 51-55; 1081-3, C. Q. 7, 16-24; 1085-6, C. Q. 34-38; 1102-3, C. Q. 171-2; 1111-2, C. Q. 220-223.

Plaintiff's counsel cross-examined Mr. Upham at great length as to whether he could give dates and words of any particular conversation. As the conversations were almost daily beginning prior to

May, 1874, and running through years, held at their houses, at the bank and elsewhere, naturally Mr. Upham could not give the words or fix the dates—except the date prior to May 2, 1874, fixed by the removal of the Minnesota Club from its old house. It is only plaintiff and Fisher who can remember with such minute accuracy. But their memory is of a different kind, for they recollect for 11 years words that were never spoken, and fix closely the dates of conversations that never could have occurred.

Of course the plaintiff's cross-examination of Mr. Upham would not be complete without an attempt to bring out something that could be used in support of the theory about the Breckenridge-Barnes link, which is so important a feature in plaintiff's case. But the cunningly-framed questions failed of their purpose. (1102-3, C. Q. 161-173 and especially C. Q. 164.)

And the extent of plaintiff's real acquaintance with Mr. Kittson and Mr. Hill during this period when, as he says, (Plff's. Ev. 123, C. Q. 126,) "Mr. Hill used to tell me most everything he knew," and his counsel makes arguments based on a supposed "intimacy," of which no trace is to be found in the evidence, appears from the fact that while Mr. Upham and Mr. Hill "have been on very intimate terms for upwards of 25 years," (Upham, 1072, Q. 14;) while from 1871 to the trial in 1888 they lived next door to each other, (except during the period from October, 1875, to January, 1878, when Mr. Hill lived on Dayton's Bluff; Hill, 754-5, C. Q. 399, 400,) and were such near neighbors and intimate friends in 1874 and 1875, (573, Q. 80, 81; Upham, 1072, Q. 15,) yet plaintiff didn't know that they were neighbors until Mr. Hill built his new house on the site of his old one and during his temporary residence at Dayton's Bluff, (146, C. Q. 154-5,) and when asked (146, C. Q. 151) "At that time (1876) what were the relations—either business relations or personal relations—between Mr. Upham and Mr. Hill?" he says; "I am not aware of any, sir; there might have been, but I do not know what it was."

We concede, however; that this must be read in the light of the exigency of plaintiff's case that he alone had obtained or could obtain from Mr. Upham (and he says he got it from no other source)

the "rated value," *i. e.*, the market quotations, of the bonds in Holland.

And besides fully informing himself and Mr. Smith as to the property, bonds, mortgages, etc., of the two companies, Mr. Hill kept himself fully advised as to the sales and market prices, in Amsterdam, of the outstanding bonds not held by the Dutch committee.

Mr. Hill states (573-4, Q. 82-3) that he obtained information on this point, and that early in 1874 Mr. Delano brought to him one Le Clercq, who afterwards sent him a Dutch weekly called the *Financier*, containing prices and editorials relating to St. Paul & Pacific securities and other matters. These Mr. Hill had translated for him by Mr. Kline, who lived next door to him, (on Canada St.,) who was a nephew of Mr. Weetjen, the president of the Dutch committee, and had much information himself.

Besides this Mr. Hill got from Mr. Upham all the information he had. (Hill, 574, Q. 83.) He was aware of Mr. Upham's dealings in the bonds of the First Division Co., and he and Mr. Upham talked on those matters a great deal, and Mr. Upham showed him the letters he received from Holland in his own transactions. (Hill, 620-2, Q. 317-328; 760-1, C. Q. 436-438.)

The information thus obtained as to prices of outstanding bonds was communicated to Mr. Smith, though, of course, neither Mr. Hill nor any one else knew at what price the bonds held by *the Dutch committee* could be bought, or whether they could be bought at all, till the prices were arrived at in 1877 by negotiations with the committee. (Hill, 766-7, C. Q. 466-7; Smith, 1188, C. Q. 214; 1216, R. Q. 14.)

Among the letters furnished Mr. Hill by Mr. Upham were letters from Lippmann, Rosenthal & Co., of date March 23, 1874, (Defts.' Ex. 15, p. 916-7;) April 1, 1874, (Defts.' Ex. 16, p. 917-8;) June 2, 1874, (Defts' Ex. 115, p. 1119;) and June 13, 1874, (Defts.' Ex. 116, p. 1120.)

The first of these letters, (Ex. 15,) that of March 23, 1874, after rendering account of a purchase made for Mr. Upham, states (917) that

"The original bonds of the different lines of the St. Paul &

Pacific R. R. Co. have become very rare in our market. It will be known to you that the bondholders have chosen, in 1873, a committee, which represents the interests of the bondholders in America, and holds their power of attorney. This committee has collected from the bondholders the greatest number of the original bonds, deposed them under notary's seal, and in exchange has emitted for each bond deposed a certificate," etc.

In a postscript Mr. Rosenthal writes that:

"It is by virtue of all these different bonds, deposited in great majority, that Messrs. J. S. Kennedy & Co., in New York, have obtained from the bondholders their power of attorney, and are named agents for all joint bondholders " etc.

On all these matters Mr. Hill is fully corroborated by Mr. Upham, who states that after the default of 1873 his attention was called to the bonds as a means of securing lands at low prices by reason of the depreciation in price of the bonds, which were receivable at par for lands.

Before embarking in the business of buying bonds, however, Mr. Upham, with the usual prudence of a banker, and with his own peculiar thoroughness, investigated all matters affecting the validity or value of the bonds, and the validity, nature, and extent of the mortgage security for each class of bonds. What Mr. Upham learned on these points, and how he learned it, he states in his testimony. (1069-1072, Q. 7-11; 1076-8, Q. 30-32, 42; 1106-8, C. Q. 191,194, 197, 202; 1113-4, R. Q. 6-8.)

Mr. Upham was cross-examined at great length as to the date when he made any one of his examinations of mortgages and other papers in the office of the clerk of the circuit and the state court, and the secretary of state, and of course he could not and did not give any specific date. But he began to buy bonds early in 1874, and prior to that time he had begun his investigations and carried them far enough to satisfy himself that the business was a safe one, and had engaged in it; though he had occasion to examine court records relating to these lines even down to the year (1888) of his deposition.

Mr. Upham states that it was his habit, on receiving letters or cable telegrams giving quotations, to put them in his pocket to be shown to Mr. Hill.

"Mr. Hill and I were intimate personal friends, and we used to talk about our personal affairs and business to each other; and anything I knew about the price of the bonds or holdings—any information—I was always glad to give him. I gave him any information I could at all times." (1075, Q. 25; 1079, Q. 50.)

Mr. Upham fixes the first communications made by him to Mr. Hill as to prices of bonds at a date prior to May 2, 1874. (1076, Q. 28.)

As early as the letter of March 23, 1874, (Ex. 15) Mr. Upham must have known that a majority of the bonds were held by the Dutch committee, of which his correspondents were themselves members. He and Mr. Hill learned accurately the amount of the committee's holdings at one time, and would afterwards get information of new accessions. On this point he says:

"I had every information that constant and active inquiry could get. I was in the bond business, and anything that affected this question was of interest to me. I always talked intimately with Mr. Hill, and gave him all information that I had about these bonds and the prices of them." (1078-9, Q. 45-50.)

On cross-examination Mr. Upham says:

"I showed him any and all letters and cables that I thought he would take any interest in I showed them to him generally about the time they were received or soon after. It might have been one day or three days. (1084, C. Q. 29.)

"Mr. Hill, in the year 1874, to the best of my memory, conversed with me about these bonds at the bank, at my house and at his house." (1099, C. Q. 149.)

He also says (1075, Q. 25) that he sometimes gave Mr. Farley quotations of prices for bonds. On cross-examination (p. 1109, C. Q. 206-212) he gives it as his memory and belief that he first knew plaintiff when he became general manager in March, 1876, and that he did not give him quotations prior to then. Plaintiff's counsel, to show that Mr. Upham had done this before 1876, brings forward press copies of two letters of plaintiff to J. S. Kennedy & Co., of date Dec. 17, 1874, and Jan. 16, 1875, which indicate that the latter had written plaintiff to inquire what a certain lot of bonds, belonging to one of their customers, *could be sold for in St. Paul*, and that either plaintiff or Fisher had called upon Mr. Upham, who "thought they could be sold at twenty cents on the dollar

flat." And the letter goes on to say: "He seems to be the only man that has any correct information as to their value, and his information *seems* to be based upon the last quotation in Amsterdam."

So far from this letter in any way weakening Mr. Upham's testimony, it shows that the inquiry (an isolated one) was not as to Amsterdam quotations, but prices *in St. Paul*; and that Mr. Upham did not give Amsterdam quotations, but expressed an opinion, which "*seems*" to be based on Amsterdam quotations.

These letters are in *Fisher's* handwriting, (Upham, 1114-5, R. Q. 11-14,) and for anything that appears it was he who personally did the errand for Messrs. J. S. Kennedy & Co.

These letters are more important, however, as showing that J. S. Kennedy & Co., when they had bonds to sell for customers, did not hesitate to call for Mr. Farley's services, and he made no demur to giving them, though not within the scope of his duties as receiver or general manager. This little incident is quite at variance with Mr. Farley's testimony as to his performance of just such services for J. S. Kennedy & Co., for other clients who had bonds to sell. (156-7, C. Q. 202-5.)

And Mr. Hill also learned the actual value of Amsterdam quotations; that they did not represent the actual price, but to each quotation must be added the interest on the bond accrued since the maturity of the last matured cupon. (Hill, 575-6, Q. 87, 89; Upham, 1115-6, R. Q. 18. And see p. 38, *supra.*)

And this was a fact evidently not known to plaintiff or Fisher, the latter whom says, (342, Q. 85,) he calculated that on a quotation of 5 per cent, the cost of $15,000,000 of bonds would be but $750,000, whereas only on two days of the year would this be true, and such quotation indicated a total price ranging from $750,000 on January 1st or July 1st to $1,312,500 on June 30th or December 31st.

Another witness of the highest standing who shows clearly that Mr. Hill was engaged in his railroad project prior to 1876, is Mr. Edward N. Saunders, president of the N. W. Fuel Co.

In August, 1874, Mr. Saunders was a competitor with Mr. Hill in the fuel business, and they had a meeting with a view of seeing

if they could arrange a partnership. And as an inducement to this, Mr. Hill spoke of his proposing to engage in this railroad enterprise, which would occupy most of his time, thus putting Mr. Saunders to the front in the fuel business. Without going into details, he told Mr. Saunders that the railroad was bankrupt, the bonds could be bought cheap, and he proposed to make that his business. (Saunders, 1487-8, Q. 6-10.)

In the spring of 1875, the partnership was formed, Mr. Hill then stating that "he had this railroad project in view, and it would occupy his whole time," (1489, Q. 14) and such proved to be the case, though Mr. Saunders did not think it would when the statement was made. (1490-1, C. Q. 3-6.)

And during all this period down to the spring of 1876, Mr. Hill had, of course, access to all those sources of information which were open to the world, including the full and minute reports of property, earnings, operations, indebtedness, lands, and land sales made by the First Div. Co. and the receiver to the state auditor and the railroad commissioners as required by law, and published and widely circulated.

During this period the condition of this railroad—the most important in the state—the causes of its non-completion, the amount of its indebtedness, the foreign ownership of the bonds, the agency of J. S. Kennedy & Co., were the subject of legislative debates, and governors' messages. We have not followed plaintiff's example in loading the record with reports of debates and with newspaper articles. Had we cared to make the search, we would doubtless have found numerous press discussions of what were then burning questions, familiar to every business man in St. Paul, if not to the boys in the streets.

While the gathering of information devolved on Mr. Hill, and his active and fertile brain was engaged in working out the details of the proposed enterprise, his information and his ideas were of course communicated to Mr. Kittson and Sir Donald Smith. The latter used repeatedly to pass through St. Paul *en route* to and from Manitoba, and Mr. Hill was more than once at Ottawa on business for the steamboat company. Mr. Smith's conversations in St. Paul, however were more particularly with Mr. Kittson. (Hill,

580, Q. 100; 760, C. Q. 434; 765, C. Q. 465; Smith, 1131-3, Q. 32-40; 1146, Q. 94; 1164, C. Q. 64; 1174, C. Q. 119.)

And Mr. Smith was kept informed of the legislation passed or proposed affecting the property. In giving his testimony, in his cross-examination (1161, C. Q. 48-9,) he shows that he was informed of the nature of the legislation advocated by Mr. Delano, in 1875. In his speech on March 12, 1875, introdued *by plaintiff*, delivered only seven days after the adjournment of the Minnesota legislature, occurs this passage: "With regard to the Pembina branch, he regretted to say that the line in Minnesota from Glyndon to Pembina was at a standstill. The legislature of Minnesota had adjourned without doing anything." (1197.)

On his redirect examination, (1216-8, R. Q. 14-19,) he shows that when he made this speech on March 12th, he was acquainted with the Delano bill, and had seen Mr. Delano's speech of February 23d, which contains a full history of the St. Paul & Pacific Co. and its affairs, and of which 500 copies were ordered printed by the house of representatives, one of which was put in evidence *by defendants*, and is Defts.' Ex. 120, pp. 1273-1300.

During this period, in connection with their steamboat business, and also as an incident to their main project, Messrs. Kittson and Hill considered the scheme of building the Breckenridge-Barnes link, and conferred with Mr. Smith in regard to it. (Hill, 587-590, Q. 124-133; Smith, 1174-5, C. Q. 121; 1178, C. Q. 144.)

Mr. Hill negotiated with Mr. Becker, president of the First Div. Co., got estimates from him, made estimates himself. With Mr. Kittson he caused the Red River Valley R. R. Co., to be organized to build this and other lines in the valley, Mr. Becker being a corporator and director. Some steps were taken in June, 1875, to raise money to build the Barnes link by the bonds of this company, to be negotiated by Mr. Smith; and this company owned the spur line from Crookston to Fisher's landing, which was operated by the receiver. (Hill, 587-8, Q. 124-6; 590-2, Q. 136-144; 729-732, C. Q. 216-246. Smith, 1174, C. Q. 121; 1178, C. Q. 144. Defts.' Ex. 6, p. 905; Ex. 7, pp. 908-910.)

Mr. Hill considered that their plan would be aided should they

build this link and obtain a lease of the extension line in the Red River Valley. (588-590, Q. 127-133.)

In regard to building this link Messrs. Kittson and Hill had conferences with plaintiff in 1874 and 1875.

Plaintiff, in his rebutting evidence, has introduced a press copy of a statement alleged to have been furnished by plaintiff to J. S. Kennedy & Co. in April, 1875, and purporting to state the terms on which "parties in St. Paul," explained as meaning Messrs. Kittson and Hill, would form a company and build this link. (Plff.'s Ex. 214, p. 1707; Fisher, in rebuttal, 1657, Q. 15.)

During these years 1874 and 1875 no negotiations were opened with the holders of the bonds. The time was not ripe. Mr. Hill was getting information and devising plans and maturing them with Mr. Kittson; and Mr. Smith was looking about for the means to carry out the enterprise, if undertaken. But he was not yet ready. It was not with him the absorbing thing it was with Mr. Hill. He did, however, mention the matter to Sir John Rose, of London, of the firm of Morton, Rose & Co. (Smith, 1153, C. Q. 5; 1173, C. Q. 108-115.)

And from 1873 onward he frequently brought the matter before George Stephen, of Montreal, with whom he was intimately acquainted, and was connected in other business enterprises. He brought the matter before Mr. Stephen again and again during this period. (Smith 1137, Q. 61 2; 1152-3, C. Q. 1-5.)

Sir George Stephen also says that from 1873 to 1876 he had frequent conversations with Mr. Smith, and that "all our conversations years before—all his efforts—were to induce me to join him," in a project for acquiring these properties if such a project should prove feasible Mr. Stephen however regarded it as impossible, and moreover knew nothing of the Northwest and had a very unfavorable opinion of it. (1225-8, Q. 7-18.)

And without such co-operation Mr. Smith was not prepared, even if he was able, to undertake the enterprise.

During these years 1874 and 1875, besides becoming acquainted with the principal litigation—that between the companies and the bondholding interest—Mr. Hill also made himself acquainted with the numerous other suits affecting the property, brought some of them

in Minnesota and some in New York. These are mentioned in a general way on his examination in chief, and are the subject of an extended cross-examination. (572, Q. 75; 576, Q. 93; 578-9, Q. 98; 748-753, C. Q. 339-388; 755-760, C. Q. 401-433.)

In this Mr. Hill was, of course, aided by his counsel, and he so testifies, (744, C. Q. 317.)

And it is altogether probable that in 1875, Mr. Hill, aided by Mr. Newel and Mr. Young, could form as correct a judgment as to the merits of these suits, and their probable duration and outcome, as could plaintiff or Fisher.

On August 13, 1875, the Litchfield agreement was negotiated between the company and its stockholders and the agents of the bondholders, subject to the approval of the committee. As was the case with everything relating to railroads of such vital importance to St. Paul, this fact became known, and more or less complete and correct statements as to the agreement appeared in the newspapers. Two of the articles are among the plaintiff's newspaper contributions to the evidence in the case, as part of Mr. Hill's cross-examination. (789-793, C. Q. 604-5.)

By the agreement itself, introduced by the defendants, (Defts.' Ex. 149, p. 1508,) it appears that it was modified by the committee, and as modified was executed by them at Amsterdam November 13, 1875. (1534-5.) On December 17, 1875, these modifications were assented to by the First Div. Co. (1535-6.) The 8th article (1519) requires a deposit of the bonds with the Associatie Cassa, in Amsterdam, or in London or New York—the former depository being that in which the Dutch committee's bonds were then held, and in which all the Dutch bonds—*i. e.* substantially all the bonds—would be placed. That company in a letter of December 15, 1875, named certain conditions for its holding the bonds. On January 18, 1876, Mr. Becker, on behalf of the First Div. Co., assented to these (but without authority from the board of directors) and on February 9th Mr. Becker's action was confirmed by the board, and the agreement became complete. (Defts.' Ex. 150, p. 1536.)

Mr. Hill, though not accurately acquainted at the time with the contents of this agreement, was aware that it must involve a scal-

ing down of the bonded debt. Possibly in February, but certainly in March, 1876, he learned at first that the compromise was completed, and that the bondholders were to be represented in the directory, and then that they were to nominate the president and have direction of the management. (580, Q. 102.)

This was a point—and a most important one—that had escaped the vigilance of the interviewer, and about which the newspaper articles are silent.

Mr. Hill's knowledge of this agreement is the subject of C. Q. 516-531, pp. 775-8, and C. Q. 603-605, pp. 789-793, in his cross-examination.

The completion of the Litchfield agreement and the fact that the bondholders were to be placed in possession of the property made it necessary, in Mr. Hill's and Mr. Kittson's judgment, that immediate action should be taken. If that agreement should be finally carried out by the adhesion of 90 per cent. of the bondholders within a year, the First Div. property would be beyond their reach, and they must limit their project to the extensions, in which case it would possess few attractions.

There was therefore need of immediate action.

On the other hand, recent legislation (the result of a compromise between the stockholders and bondholders of the Southern Minnesota and the Lake Superior & Mississippi R. R. Cos., both of which roads were the subject of foreclosure suits in the U. S. circuit court for Minnesota,) made it possible to foreclose a mortgage on a land-grant railroad without destroying the immunity from taxation which in each case attached to the granted lands only "until sold or conveyed, or contracted to be sold." The act effected this purpose by allowing the purchasers to organize as a corporation, with all the franchises and exemptions of the original company.

This important act relating to reorganization by purchasers at railway foreclosure sales, was passed March 6, 1876. Laws 1876, *c.* 30; Gen. St. 1878, *c.* 34, § 87.

And Mr. Hill was fully advised of its passage, its terms, and its importance to the project in which he was engaged. (Hill, 581-2, Q. 103-4; Defts.' Ex. 117, p. 1266.)

Mr. Hill's Trip to Ottawa in March, 1876.

The way to a reorganization being opened, and the situation being deemed to require prompt action, it was determined that Mr. Hill, who was about visiting Ottawa, should bring these matters to the attention of Mr. Smith.

Accordingly Mr. Hill and Mr. Kittson and Mr. Galusha, who was the latter's personal legal adviser as well as counsel for the Red River Transportation Co., held a conference, at which the Litchfield agreement was discussed, as well as the question of acquiring the First Div. Co, stock held by Mr. Litchfield, and Mr. Galusha prepared a short opinion, outlining the recent legislation as to reorganization, pointing out the advantage of getting the stock etc. Mr. Galusha refers to the decision of the supreme court (*i. e.* the Parcher case) regarding the exemption of the land grant from taxation after sale on foreclosure, but as that point was expressly covered by the then recent legislation, this question evidently did not receive from him so much consideration as had been given to it by Mr. Hill and his counsel. Mr. Galusha, indeed, when examined in May, 1888, at St. Paul, and before his opinion had been found at Montreal, where it was offered in evidence on the examination of Sir. Donald Smith, states his impression that this was the first time that his attention was called to the pending scheme of Mr. Kittson and Mr. Hill, (1042-3, Q. 5, 12) and that he gave Mr. Hill a "written memorandum," and later, when examined in July, after the opinion was in evidence, he says it was a "simple, preparatory opinion, done without any great care or preparation." (1478, Q. 4.)

The importance of this paper as a document made before the time when plaintiff and Fisher "originated the scheme," was so apparent that the plaintiff's counsel labored at length and in vain to show that it might have been made for Mr. Stephen's use in going to England in 1877. But the internal evidence of its contents is almost conclusive that it was prepared when the act of March 6, 1876, was recent. And the fact that it is so limited in its scope shows that it was meant for some one well acquainted with the subject-matter—not for foreign capitalists.

The opinion is Defendants' Exhibit 117, p. 1266. Mr. Galusha's original testimony (given May 2d and 3d) is on pages 1042-3, Q. 5-12; 1055-7, C. Q. 11-19; 1058-9, C. Q. 24-31; 1060-1, C. Q. 41-47.

His testimony, when recalled, after the opinion had been found, and had been put in evidence at Montreal, is on pages 1478-1484, Q. 1-7; C. Q. 1-38, R. Q. 1. And especially C. Q. 5, 17, 21-24.

Mr. Hill's testimony is that he left St. Paul for Ottawa about March 17, 1876, (586, Q. 117; 768, C. Q. 473.) His purpose was to see Mr. Smith, and also transact business with the Canadian government relating to the carriage of rails to Manitoba, the former being the more important, (768, C. Q. 474-476.) He breakfasted with Mr. Smith by appointment, gave him what additional information he had obtained, discussed with him the Litchfield agreement, and its effect, if carried out; the question of acquiring the Litchfield stock as a means of settling the First Div. foreclosure suits; and the matter of acquiring the Dutch committee's holding of bonds. Mr. Smith said he believed that he could interest friends in London, naming Sir John Rose, in the enterprise. And then for the first time Mr. Smith expressed the wish that Mr. Kittson and Mr. Hill should go on and find out at what price the bonds of *the Dutch committee* could be bought, including, in any event, those of the St. Vincent extension. (582-4, Q. 106-111; 765-7, C. Q. 465-7.)

While they were informed of prices of *outstanding bonds* sold on the Holland market, they were not (nor was anybody else) aware of any prices at which the bonds held by *the committee* could be bought, or wheher they could be bought at all. (Hill, 766-7, C. Q. 466-7.)

Mr. Smith made it a point that although the extension mortgage was very large, ($15,000,000.) and the security for the bonds much less valuable than for those of the First Div., still these bonds must be included in any negotiation, in order to the completion of the St. Vincent extension to a connection with the Canadian government railway at the boundary; Mr. Smith's object being to acquire *all* the lines and complete that extension. (Hill, 767-8, C. Q. 468-472.)

Sir Donald Smith corroborates at all points the statements of

Mr. Hill as to this meeting at Ottawa, Mr. Hill breakfasting with him at the "Bank Cottage," and the conversation between them. He says, that as the result of the information Mr. Hill then gave him, "we thought it was an opportune time to endeavor, if we possibly could, to acquire the property, and that Mr. Kittson and Mr. Hill should, by correspondence with the Dutch bondholders or committee, try and see what could be done in the matter, and if this was satisfactory, then I would try to do my part in inducing some friends to take it up." By the expression "if this was satisfactory," he says he means "If the information obtained with regard to the prices and the manner in which the bonds could be obtained" was satisfactory, for "of course I couldn't go to friends with simply a crude statement without having some *data* positively to go on. I should never have dreamed, as a business man, of doing so." (1133-4, Q. 44-7.)

At this meeting the stock held by Mr. Litchfield was talked of "and of course they were to endeavor to acquire it." (1134, Q. 48-9.) And though he cannot speak positively as to the change of management being mentioned, he says:

"I know very distinctly and very positively that the impression made on my mind by Mr. Hill, and by all he told me at the time, was such that I was more desirous than I ever had been before to make an effort to get the road; and I felt that what further information we required then was that of the prices, chiefly the prices at which the bonds could be secured, and for which we could get the stock." (1135, Q. 49½.)

He identifies Mr. Galusha's opinion as one of the papers which he thinks Mr. Hill then gave him, though he "cannot say absolutely that it is," (1135, Q. 51-53,) and says that he insisted on including the St. Vincent extension line, and one of his objects and the chief object was to have the line finished, to give entrance by rail to the Canadian Northwest. (1136, Q. 54.)

He gives it as his impression that he handed to Mr. Stephen the papers he received from Mr. Hill, (1138, Q. 63,) and is quite sure that he named Sir John Rose, of Morton, Rose & Co., of London, as one to whom he expected to apply for aid, he being an officer of the Hudson's Bay Company, and his firm being largely connected

in American operations. And he states by what means he trusted to secure the favorable opinion of Sir John Rose and Mr. Stephen, and that he expected to get the money in London or New York, or both; not in Montreal. (1138-9, Q. 64-7)

On cross-examination (1163, C. Q. 61-2,) he further corroborates Mr. Hill by stating that Mr. W. S. Alexander was in Ottawa with Mr. Hill. He is sure that the meeting was in 1876 and not in 1875, nor is his belief shaken by the reading of a copy of a letter indicating that Mr. Hill and Mr. Alexander were in Ottawa in 1875. (1163-4, C. Q. 61-68.)

He repeats that Mr. Hill spoke to him of recent legislation, and of the changed position of things from 1875, and reasserts his belief that he received Mr. Galusha's opinion from Mr. Hill at that meeting, and afterwards handed it to Mr. Stephen. (1165-7, C. Q. 69-76; 1176, C. Q. 129-132.)

Mr. Hill, in his testimony, states that Mr. W. S. Alexander was present with him at Ottawa at this visit in March, 1876, relates an incident attending their departure, and says they left Ottawa together, traveling in company as far as Detroit, from which place Mr. Alexander went to some point in Michigan—Grand Rapids or Saginaw—Mr. Hill continuing his journey to Chicago and St. Paul. (584, Q. 112; 719, C. Q. 534-536.)

And he thinks his stay in Ottawa was a day and two nights. (770, C. Q. 495.)

Besides the testimony of Sir Donald Smith, the fact, the date and the circumstances of this visit to Ottawa are established by the testimony of Mr. Alexander And he is able to fix the date of their stay in Ottawa by the fact that on leaving Mr. Hill at Detroit he went to East Saginaw and became engaged to his wife. He was at East Saginaw March 26th, and he thinks he arrived there the 25th. He fixes the year by the additional fact that it was the last year of his service with the Northern Pacific Railroad Co. (1473-5, Q. 7-29; 1477, R. Q. 1.)

And convincing and conclusive proof of this visit and its object and the matters discussed between Mr. Smith and Mr. Hill is furnished by the testimony both of Mr. Hill and Mr. Stanford Newel as to their meeting in Chicago, on Mr. Hill's homeward trip.

Mr. Hill (584, Q. 112) mentions this meeting, and says it was the 25th, 26th, or 27th of March.

Mr. Newel say: "I met Mr. Hill in Chicago, on Sunday the 26th of March, 1876, and we came on the same train to St. Paul that night, arriving here the next day." (1323, Q. 23.) "When I met Mr. Hill in Chicago, I think the first thing he said to me was 'Donald A. Smith is ready to take hold.' I have got that fixed in my memory as said to me at that time, and my answer to him was: 'Why this is the crisis of the whole business.'" (1324, Q. 27.) It made a great impression on him because he had been in New York on the day of the directors' meeting when Mr. Barnes was chosen president of the First Div. Co., and had been told of the fact the same day by Mr. Bigelow. And on his way home he met Mr. Hill in Chicago, who told him he had been to Canada and seen Gov. Smith. (1324, Q. 27-8.)

Mr. Newel was not cross-examined on this point.

Between Chicago and St. Paul Mr Hill and Mr. Newel met and made the acquaintance of John S. Barnes, of J. S. Kennedy & Co., who had recently been made president of the First Div. Co., under the Litchfield agreement. They engaged in conversation, Mr. Barnes being in quest of information about the country along the First Div. lines, and Mr. Hill giving him information. (Hill, 584-5, Q. 112-3; Newel, 1323-5, Q. 24-30.)

On cross-examination the plaintiff's counsel asked Mr. Hill if he discussed with Mr. Barnes the Breckenridge-Barnes link, or told him of the bond project, and he says he did not. (780, C. Q. 549. The whole cross-examination is on pages 779-781, C. Q. 539-552.)

As to the date of this journey to St. Paul, see also Upham, 1088, C. Q. 57; 1094, C. Q. 100.

The Conferences with Mr. Barnes in April, 1876.

Mr. Barnes, arriving at St. Paul March 27, 1876, remained here about ten days. Plaintiff says (69, Q. 73) that he stayed "a week, maybe ten days." And in another place, (1375, Q. 103,) he says: "Some 10 or 15 days." Mr. Hill thinks that his visit lasted until about the 10th or 15th of April. (786, C. Q. 581.) He had

arrived home by April 20th, as appears by his letter of that date. (Plff.'s Ex. 74, p. 242.)

That Messrs. Kittson and Hill had business interviews with Mr. Barnes during that visit, and that the business was in some way related to these railway properties, and that plaintiff was informed of the subject of their conversations, cannot admit of doubt. He admits the interviews, but says that "they were strangers to Mr. Barnes," and he sought an introduction to them. (But Mr. Hill was not a stranger and no introduction was needed.) He also says in his *original* testimony: That Mr. Barnes wished this introduction on account of the Breckenridge-Barnes link, the importance of which to the First Div. plaintiff had more fully realized since becoming general manager; that this subject was discussed between the four, "but complications of one kind and another prevented them from seeing their way clear to do anything." (69, Q. 74.)

And he says (70, Q. 76.) that after this his own interviews with Messrs. Kittson and Hill in regard to their furnishing money for this link, "continued right along for months." And both he and Fisher make their pretended agreement have its inception in the summer in a talk about the Breckenridge-Barnes link. (Fisher, 341, Q. 85.)

Mr. Hill, however, states positively that during Mr. Barnes' visit, and in pursuance of Mr. Smith's request, he and Mr. Kittson:

"Had interviews with Mr. Barnes, during which we made him acquainted with what we wanted to do, substantially, and we asked him if his firm, as agents of the Dutch committee of bondholders covering the First Div. and the extension of the St. Paul & Pacific, —if they were ready to name a price at which they would sell the bonds controlled by them. Mr. Barnes replied that as matters then stood he didn't see his way to what we wanted—that is, making us a price at which the committee would be prepared to sell. I remember discussing it with Mr. Kittson, and, I think, Mr. Galusha, and we were unable to make up our minds whether Mr. Barnes' reference to the situation as it then stood referred to his position as president under the Litchfield agreement, or whether the firm of J. S. Kennedy & Co. desired to retain control as the representatives of the Dutch bondholders in America, for the sake of the money compensation there would be to them in the matter. Mr. Barnes

stated that while the situation was as he described it at that time, that later it might possibly change; in which case he would be glad to hear from us, or we would hear from him. We were not able to get Mr. Barnes to fix a price at which the bondholders would sell their bonds during his visit to St. Paul in late March and early April, 1876." (585, Q. 115.)

And Mr. Hill further says, (587, Q. 121:) "*A short time after our interview with Mr. Barnes, Mr. Farley spoke of it, and spoke of it several times during the summer.* I think his conversations were more with Mr. Kittson than with me." And he also says that "about the time the agreement with Mr. Litchfield expired," (about the middle of August, 1876,) "a telegram was sent to Mr. Barnes making inquiry." (587, Q 123.)

Conclusions from Foregoing Evidence.

If this testimony is true, (and, if not true, it could hardly be other than wilfully false,) then it is proved, not only that the enterprise which finally culminated in the acquisition of the property originated with Mr. Donald Smith in 1873; not only that for more than two years Mr. Hill had been gathering information on all points and from all quarters, with the aid of his counsel and of his friends; not only that he had complete and authentic information on all matters which could affect such an enterprise, including each and every of the things which plaintiff says were within his exclusive knowledge when the agreement was made, but most of which by his own confession, were not at all known to him on March 13, 1876; not only had Mr. Hill and Mr. Kittson, sharing this information, gone on ripening their plans, and waiting till the opportunity should come and Donald Smith should be ready to take active steps towards the purchase; not only had Mr. Smith, in March, 1876, directed Messrs. Hill and Kittson to open communications with the Dutch committee; not only had all this taken place, but before the 10th—certainly before the 15th—of April, 1876, Messrs. Kittson and Hill had opened communications with Mr. Barnes as the representative of the Dutch committee, and inquired and tried to learn from him whether the committee's bonds could be bought and at what price, *and plaintiff knew they had done so.*

And if all this had been done, what becomes of plaintiff's and Fisher's story that they originated the scheme in the summer of 1876? And of Fisher's elaborate statement of Mr. Hill's and especially of Mr. Kittson's dense ignorance concerning the property and the bonds? And of the reluctance of Mr. Kittson to entertain the project, so that Fisher, after his second talk with Mr. Kittson, "felt as if it was a hopeless case?" And of Mr. Kittson's refusal to take it up unless plaintiff was interested, so that he should tell them what to pay for the bonds? And of Mr. Kittson's saying that "Mr. Farley has made a great change in that property since he has managed it?" And of Mr. Hill's proposal to send a man to Amsterdam to buy outstanding bonds, which would have ruined the enterprise, and from which he was only dissuaded by plaintiff telling him so, and that what they wanted were not the outstanding bonds, but those held by the committee?

And what becomes of Fisher's minute and circumstantial account of conversations, the places and times, the progress of the season from the very hot Sunday at Mr. Kittson's office until the cooler weather when the compact was made, and the cigar at Mr. Kittson's office so faithfully remembered for 12 years?

If the statements of Mr. Hill, Mr. Upham, Mr. Newel, Mr. Saunders, Mr. Galusha, Mr. Alexander and Sir Donald Smith as to what had taken place prior to Mr. Barnes' visit are true—(and if anything can be proved by human testimony, strengthened by contemporaneous documents, the facts to which they testify must be taken as true;) and if, in addition to all this, Messrs. Kittson and Hill had the interviews with Mr. Barnes to which Mr. Hill testifies, then it must be that Fisher's and Farley's testimony is not and cannot be true, and their story is a fabrication.

It is self-evident—plaintiff and his counsel concede it—that this direction by Mr. Smith, followed by the negotiation with Mr. Barnes, —a negotiation of which plaintiff was at once informed by Barnes, —was absolutely fatal to any story or theory of an agreement made *in the autumn*, as the result of an idea imparted to Mr. Hill by Fisher in the summer.

Plaintiff's Attempts to Discredit the Foregoing Evidence.

The effect of this evidence must be avoided, or plaintiff's case must fall.

Were this the ordinary case of an agreement that might have been made as well at one time as another, and the date of which had been sworn to only generally, the plaintiff would have had two courses open to him: (1.) To say that he had made a mistake in the date. (2.) To deny and discredit the testimony showing the prior operations of defendants, the direction given at Ottawa, in March, 1876, and the subsequent negotiations with Barnes, *and the plaintiff's contemporaneous knowledge* of those negotiations.

But in this case the first avenue of escape was barred (1) partly by the nature of the case—the inherent improbability of plaintiff devising or even being admitted into any such scheme at any time prior to Mr. Barnes' visit; and (2) conclusively by the statements so fully sworn to in the relation of the original story.

To change the time of the conferences and the agreement from the autumn to a date prior to Barnes' departure would be to confess that the statements they had sworn to and relied on to get credence for their story, were not only untrue, but were fabricated.

There was, therefore, but one course open to plaintiff—to adhere to his original story. If his own memory is such that he can be trusted as a witness at all, *he knew* that in April, 1876, he had been aware of defendants' negotiations with Barnes, and that those negotiations related to the purchase of the bonds. But while he had heard all the testimony, and his own recollection had been fully refreshed by it, (if any refreshing were needed,) he knew that that testimony was oral. Even when the defendants, in April, 1888, (after Mr. Hill's deposition,) took the deposition of Nichols, (Kennedy & Co.'s clerk,) and put in evidence correspondence between plaintiff and that firm, there was still *no writing* in evidence, which, *in itself*, and without aid from oral testimony, proved either the direction given by Mr. Smith at Ottawa, or the *character* of the ensuing negotiations with Barnes, or the plaintiff's own knowledge of their character.

This seemed to make it safe for plaintiff to take what was, indeed, the only course by which his case could be saved. So long as the evidence against him was oral, he would set his oath and Fisher's against all the defendants' witnesses. He would claim that all of Messrs. Kittson and Hill's transactions prior to Fisher's first suggestion of the bond purchase had concerned merely the Breckenridge-Barnes link, and that the interviews with Barnes had to do merely with that link. Accordingly, and until, when examined again in July, 1888, he was confronted with a letter written by himself, (*of which he had kept no copy,*) he denied over and over again, in the most positive terms, any knowledge of Messrs. Kittson and Hill's negotiations with Barnes concerning the bonds. He swore that "*Mr. Barnes never opened his head on that subject of Mr. Hill and Mr. Kittson wanting to buy the bonds. I was very much surprised to hear that testimony. Not one single word, sir, did he speak to me on that subject. The purchase of the bonds was never mentioned by Mr. Barnes to me. I wish to be distinctly understood that I never had heard the subject mentioned.*" (1356-7, Q. 32, 33, 35.)

And so no effort was spared to break down Mr. Hill's narrative on the cross-examination. And in reading that cross-examination, it is to be remembered that Mr. Hill was the first witness for the defence, and his statements had received no part of that corroboration that was afterwards given them.

No small part of the cross-examination was devoted to the interviews with Mr. Barnes. It will be found on pages 781-6, C. Q. 554-584. The interviews could not be gainsaid. All that could be attempted was to compel Mr. Hill to admit that they related solely to the Breckenridge-Barnes link, or to lay the foundation for a contradiction and refutation of him if he asserted the contrary. Mr. Hill, however, persists that the interviews were on one and the same subject—the purchase of the bonds. He recalls no interview in which the link or cut-off was discussed, and, though he admits that it *may* have been *mentioned*, he does not remember that it was. He says that the interviews with Mr. Barnes were not chance meetings, and he repeats as positively as in his direct examination, and with greater detail, the things he had already sworn to.

Finally, and to give Mr. Hill his *coup de grace*, counsel read to him from three letters of Mr. Barnes to Mr. Farley, dated June 9, June 19, and December 18, 1876, (which had been introduced by plaintiff on Farley's examination, and are Plff.'s Ex. 87, p. 252; Ex. 89 p. 253; and Ex. 108, p. 266,) asking him, after each reading, if he persists in his statements, to which Mr. Hill, in each case, replies, "Yes, sir; I do." (785-6, C. Q. 578-580.)

The letter of June 9, especially, assumes very great prominence in this case. All the letters were evidently relied on to substantiate Farley's and Fisher's stories about the Breckenridge-Barnes link; that Mr. Hill's conversations with Mr. Barnes were merely about this link; and that the interview between Fisher and Mr. Hill, when the former first brought forward the scheme, was in regard to this link. But the letter of June 9th is the most important, and the material part—that read to Mr. Hill—is as follows:

"I have constantly in mind my conversations with Mr. Kittson and Mr. Hill, and have had much talk with Mr. Kennedy about it. Matters are so complicated that at this time we do not see a clear way to the desired object, but as matters progress we hope to do so. When the time comes and the way seems at all clear, I will confer with you regarding it."

It will be noticed that Mr. Barnes means to confer with plaintiff, his firm's and the committee's agent, before taking up any negotiations with Messrs. Kittson and Hill.

After Mr. Hill's examination, the defendants, in April, 1888, took the testimony of Mr. E. T. Nichols, from February, 1876, to 1882, a clerk in the service of J. S. Kennedy & Co., specially employed to assist in the St. Paul & Pacific business—First Div. and Extensions—and charged with the duty of looking after the correspondence, Mr. Nichols being now the assistant treasurer of the Manitoba R'y Co. (Nichols, 955, Q. 1-6.)

He identified (95-6, Q. 7-10) the following telegram with his own contemporaneous endorsement on it. (Defts.' Ex. 44, 992:)

"Dated St. Paul, 16, 1876.

Received at Western Union Building, Broadway and Dey St., Aug. 16.

To Jno. S. Barnes, Care J. S. Kennedy & Co., N. Y.

Will the bondholders' committee make an offer fixing the prices

of each of the different classes of bonds controlled by them, upon which they will sell out entirely & let foreclosure be made here.

N. W. KITSON.

[Endorsed:]

N. W. KITTSON, Aug. 16th, 1876."

He also identified, in a letter-book of J. S. Kennedy & Co., kept for use and used in the St. Paul & Pacific business, the press copy, in Mr. Barnes' handwriting, of his telegram in reply to the foregoing message. This appears in evidence in Nichols' deposition. (957, Q. 13-18,) and is as follows:

"Aug. 17th. 6.

"N W. Kitson, St. Paul, Minn.

"Have written Farley on the subject to-day.

J. S. BARNES."

The letter of Aug. 17, 1876, to Mr. Farley, mentioned in this message, like several other letters of the highest materiality and importance, is wanting from the mass of correspondence produced by plaintiff. That it was received by him is, however, evident from his reply to it, which was introduced by defendants. (Defts.' Ex. 140, p. 1492.)

MR. FARLEY'S EXAMINATION BY DEFENDANTS.

After introducing the corroborating evidence of Mr. Galusha, Mr. Upham, Sir Donald Smith, Sir George Stephen, and Mr. Newel, in regard to the origin and progress of the enterprise, and what had been done down to the interviews with Mr. Barnes, (and being deprived by the sudden death of Mr. Kittson of the benefit of his testimony in confirmation of that of Mr. Hill,) the defendants, in July, 1888, called Mr. Farley, who had been present at the taking of all the depositions, and gave him an opportunity to testify, after this refreshing of his memory, as to the meaning of the letter of June 9th, and as to the subject of the conversations of Messrs. Kittson and Hill with Mr. Barnes, which are therein mentioned.

He states that prior to the meeting in the fall of 1876, when the combination was formed, he was not concerned in any enterprise for the purchase of the Dutch committee's bonds or the acquisition of the railroad properties; and before his first conversation with

Mr. Hill, (following the latter's interview with Fisher,) he had not been concerned in any such project, and had not talked with any one about forming a party for any such purpose. (1349, Q. 1-3.)

He denies that he ever talked with Mr. Barnes about Kittson and Hill's project till Barnes was in St. Paul with Carp in *February, 1877*, and then Mr. Barnes was incredulous, and "would not stand still long enough for me to talk about it," and he "hooted at the idea." (1350, Q. 9.) That he had had correspondence with Mr. Kennedy and Mr. Barnes about Hill and Kittson raising the money for the cut-off in the Red River Valley, (the Breckenridge-Barnes link,) but not in connection with purchasing the bonds. (1350, Q. 8-10.)

He is shown Mr. Barnes' letter of Dec. 18, 1876, (Plff.'s Ex. 108, p. 267,) where he writes (*inter alia*:) "I hope our friends Kittson and Hill have seen Mr. Carp, and have made him understand what their plans and purposes have been," etc., and he says: "I understood it referred to the completion of the cut-off from Breckenridge to Barnesville, and finally the completion of the line from Snake River to St. Vincent. It had no reference to any purchase of bonds that I know of." (1351, Q. 11.)

He is shown Mr. Barnes' letter of June 19, 1876, (Plff.'s Ex. 89, p. 253,) where Mr. Barnes writes: "I have much to say to you regarding matters that we have talked of with our St. Paul friends, Mr. Kitchen and Mr. Hill, but shall defer it until I see you. Things are working in the right direction for what we both want; whether there are insurmountable obstacles or not remains to be seen." And he says: "It had reference to the completion of those lines, principally the cut-off from Breckenridge to Barnesville." (1352, Q. 13.)

"Q. 14. Do you mean to be understood that the matters spoken of in the passage quoted as having been talked of, and the expression in that letter, "what we both want," merely referred to this railroad building, and did not refer to the acquisition of these railroad properties by Messrs. Kittson and Hill?

A. Yes, sir. I mean to convey the idea they had no reference to the purchase of any of the bonds, but the mere completion of those lines.

Q. 15. What reason have you for being thus clear as to the meaning of the passage quoted from the letter?

A. I am thus clear from the fact that I was very anxious to accomplish the finishing of those lines—the Breckenridge-Barnes cut off particularly, and the other if it could be done; *and I am clear that I never spoke to Mr. Kittson in my life about purchasing the bonds until that interview in my office, which was later;* never said a word to him on the subject in my life until that date.

Q. 16. And when was that interview that you have just spoken of?

A. Oh, I think it was in August, sir, of that year. I have reason to think there was a great deal said to Mr. Kittson by Mr. Hill and Mr. Fisher before I ever said anything to him on the subject *Probably weeks and months* that talk was going on, but I had nothing to say to him until that interview.

Q. 17. At the time the letter was written, June 19, 1876, had you heard of any plan or project of Mr. Kittson and Mr. Hill, or either of them, for acquiring the property of these two railroad companies?

A. *I never had, sir. Mr. Hill might have been babbling about it, as he did to Sanford Newel, two or three years before that, but it didn't amount to anything.*

And in answer to Q. 18, (1353) he says that at the date of the letter of June 19th, or at any time in the summer of 1876, he was not connected with Mr. Barnes in any project for acquiring the Dutch committee's bonds or the properties in any way, sense or manner.

The defendants' counsel then proceeded further to refresh plaintiff's recollection by calling his attention to Mr. Barnes' letter to him of June 9, 1876, (Plff's Ex. 87, p. 252,) which is, in full, as follows, (after date and address:)

Referring to your letter of the 3rd, regarding the refund to Bishop Ireland of the cost of ¼ section of land, I have no objection to it, and think it would be a fair equivalent for the Bishop's activity in bringing in settlers. Did he pay cash or bonds? If in bonds, he should be paid the cost to him of the bonds used in payment.

I have constantly in mind my conversations with Mr. Kittson and Mr. Hill, and have had much talk with Mr. Kennedy about it. Matters are so complicated that at this time we do not see a clear way to the desired object, but as matters progress we hope to do so. When the time comes and the way seems at all clear, I will confer with you regarding it. Yours very truly,

J. S. BARNES.

Plaintiff in answer to quesitons 19-21, (1353-4,) gave a clear and probably accurate statement of the meaning of the first paragraph of the letter, showing that he actually recollected the circumstance of a mistake committed, which the bishop wished to have corrected.

Being asked (Q. 22, p. 1354,) "whether Bishop Ireland had not paid for the lands with bonds obtained from Mr. Kittson and Mr. Hill, and whether or not that transaction is the matter referred to in the *second* paragraph of the letter," he says:

"A. I have no knowledge of Bishop Ireland buying any bonds of Mr. Kittson and Mr. Hill; but that last paragraph has no more to do with the upper one there than the moon has with the sun. *That last one entirely has reference to the talk we had about trying to raise the money to build the cut-off and St. Vincent extension.*"

The fact that plaintiff had never hinted at any negotiation with Kittson and Hill in regard to completing the St. Vincent extension until after the testimony of Messrs. Hill, Galusha, Upham, Smith, Stephen and Hill had been given, and it became necessary for the plaintiff to invent a theory that Mr. Smith's project and that of Mr. Hill and Mr. Kittson was merely for building the cut-off or for completion of the St. Vincent extension; the fact that such completion *by itself*, or *merely* in connection with the building of the cut-off, would do Messrs. Kittson and Hill more harm than good by destroying the business of their steamboat line; and the fact that defendants' counsel were not then advised (nor are they now) that any of the numerous letters produced by plaintiff contains the slightest reference to any idea that Kittson and Hill should furnish money to finish the St. Vincent extension, led defendants' counsel to ask the witness to point out among plaintiff's exhibits, for their benefit, any letter having any such reference; but instead of doing this, (and he could not do it,) he goes off with a statement that he thinks before that date there was a good deal of running talk possibly between himself and Messrs. Kittson and Hill, but Mr. Fisher had a good deal more than he to say about it with Mr. Kittson. (1354-5, Q. 23.)

He was then asked (1355, Q. 30) his reasons for the opinion he

had expressed as to the meaning of the *second* paragraph of the letter of June 9th, which was again read, and he again says (1356) that the matter of raising money "to finish these lines" had been talked of by him with Mr. Barnes and a great deal with Mr. Hill, "and the trouble was they could see no way, if they put their money in there to get a good title," and J. S. Kennedy & Co., as agents for the bondholders, were looked to, to find a way to give a title

As plaintiff had heard Mr. Hill's testimony, the defendants sought to ascertain how far that testimony had operated to refresh his recollection as to Mr. Barnes' visit and his own subsequent talks with Mr. Hill, and so put the questions and elicited the answers following: (1356-7, Q. 31-35.)

Q. 31. Were you present when Mr. Hill testified in this case, and did you hear his testimony to the effect that during Mr. Barnes' visit here, in March and April, 1876, Mr. Kittson and Mr. Hill talked with Mr. Barnes, in regard to the purchase of the bonds held by the Dutch committee?

A. Yes, sir; I heard that testimony, and recollect it very distinctly.

Q. 32. Refreshing your recollection by your remembrance of that testimony, do you not think that the second paragraph of this letter may have referred to a plan of Mr. Kittson and Mr. Hill for acquiring the properties of the First Div. Co. and the St. Paul & Pacific Co., and for the purchase of the Dutch committee's holdings of the bonds of those two companies?

A. When I heard that testimony, sir, I was very much surprised that—if the thing took place as Mr. Hill stated it, it was very surprising to me that Mr. Barnes, with his usual familiarity with me about this property, did not say something about it; *but he never opened his head on that subject of Mr. Hill and Kittson wanting to buy the bonds. I was very much surprised to hear that testimony.*

Q. 33. Did Mr. Barnes say anything to you, while he was here in the spring of 1876, about Mr. Kittson and Mr. Hill desiring to buy the properties of the two companies—the First Div. Co. and the St. Paul & Pacific Co.—or to acquire those properties?

A. *Not one single word, sir, did he speak to me on that subject.* He did talk with me a good deal about having interviews with them about raising the money to finish those lines that I have

referred to; *but the purchase of the bonds was never mentioned by Mr. Barnes to me.*

Q. 34. You say that you was surprised by Mr. Hill's testimony.

A. Yes, sir.

Q. 35. Do you mean to be understood that before this time—June 9, 1876—you had not learned from any quarter that during Mr. Barnes' visit here in March and April, 1876, Mr. Hill and Mr. Kittson had talked with him about their wish to acquire the properties of these two companies, and talked with him about the purchase of the bonds of these two railroad companies held by the Dutch committee?

A. *Yes, sir; I wish to be distinctly understood that I never had heard the subject mentioned.*

Thus far, certainly, we had gained from the witness no corroboration for Mr. Hill. On the contrary he ranges himself squarely against Mr. Hill, and gives him the lie direct. Without equivocation or reserve plaintiff makes statements such that either he or Mr. Hill has testified falsely. There is no room for the suggestion of an innocent mistake.

Plaintiff had added to the plan of the Breckenridge-Barnes link that of the Extension lines, and had made the furnishing of money for these the subject of conversation with Mr. Barnes in his March-April visit in 1876, and of frequent conversations during that summer.

As has been stated, so far as the Extension lines are concerned, any such plan would be simply destructive of the steamboat line, and no reference to any such plan is mentioned in any of the correspondence. And in his rebutting evidence plaintiff has introduced a statement made up by himself or Fisher, and furnished J. S. Kennedy & Co., of the conditions insisted on by Kittson and Hill early in 1875, and without which they would *not* furnish money to build the Breckenridge-Barnes link, and one of these conditions is that the *St. Vincent line shall not be built* for two or three years. This was in April, 1875. (Plffs.' Ex. 214, p. 1708; Fisher, in rebuttal, 1655-7, Q. 7-16.)

And it is highly improbable that at any time after March 13, 1876, and *during that year*, the matter of furnishing means for the link or cut-off should have formed the subject of conversations between

Messrs. Kittson and Hill on the one hand and Mr. Barnes, or plaintiff, or Fisher on the other. This is so, because

1. While the correspondence of 1873, 1875, and 1877 between plaintiff and J. S. Kennedy & Co. and the members of that firm is filled with references to the building of the cut-off, no reference whatever to this subject is to be found in any letter of 1876 (for it will appear that the three letters of June 9, June 19, and Dec. 18, have nothing to do with the cut-off.)

The first reference to the cut-off is in plaintiff's letter of Dec. 4, 1873. (Plff.'s Ex. 11, p. 188.) In 1875, he writes about it on April 15 (Ex. 33, p. 208;) on May 28 (Ex. 34, p. 209;) on July 17, (Ex. 213, p. 1706, in rebuttal, and see Ex. 214, p. 1707.) And in 1877 it fills a larger space in the correspondence than any other matter.

2. And there is a reason for this silence. In the legislative session of 1876, a bill was introduced by Mr. C. A. Gilman, known as the Gilman bill, which became a law March 6, 1876, which forbade the construction of any such connection between the Main line and the St. Vincent extension uutil after the latter should have been completed from St. Cloud to St. Vincent and the Brainerd branch also completed. (Sp. Laws 1876, *c.* 117, p. 203.)

The title is:

"An act to prevent the diversion by the St. Paul and Pacific Railroad Company of lands granted by congress to the state of Minnesota, and by the state to said company, to aid in the construction of a railroad from St. Cloud to the navigable waters of the Red River of the North, by said company converting that part of said railroad running north from Glyndon into a continuation of the Main line of the First Division of the St. Paul and Pacific Railroad, and abandoning that part of said railroad running from Melrose to Glyndon."

After a preamble reciting the grants to the St. Paul & Pacific Co., the settling of a large population along the line between St. Cloud and Glyndon, on the faith of the company's promise to build that line; the threat of the St. Paul & Pacific Co. to abandon that part of its line, and to make the line north of Glyndon a mere feeder to the Main line of the First Div. Co., the act provides:

"Sec. 1. The St. Paul & Pacific Railroad Company shall not, nor shall any company or individual owning or operating the lines thereof, directly or indirectly make or maintain, or cause to be made or maintained, or permit, any railroad connection whatever with or between the so-called St. Cloud and St. Vincent extension line of railroad and the Main line of the St. Paul & Pacific railroad, or any branch or extension thereof, or any railroad connection therewith, at any point westerly of range number 41, in said state, until the full completion of the lines of railroad of the St. Paul & Pacific Railroad Company, extending from St Cloud to St. Vincent and from Sauk Rapids to Brainerd; nor shall any of the parties above named in this section, by any lease, purchase, sale, or contract of any kind, facilitate or permit any running connection with any road constructed or operated by any party west of said range, and between the Main line road and the St. Cloud and St. Vincent extension line road above mentioned, prior to the full completion of the said extension lines between St. Cloud and St. Vincent, and between Sauk Rapids and Brainerd.

"Sec. 2. In case the St. Paul & Pacific Railroad Company or their successors shall violate any of the provisions of this act, then and thereupon all the rights, benefits, privileges, lands, property and franchises conferred upon said company by any act of the legislature of this state pertaining to all parts of said lines of road which are unfinished at the time of the passage of this act, shall become and be forfeited to the state, absolutely, without any judicial or legal proceedings whatever, in which case all and singular the same without merger or extinguishment, to be used, granted, and disposed of by the state to aid in the construction of said lines of road between Sauk Rapids and Brainerd, and between St. Cloud and St. Vincent.

"Sec. 3 This act shall take effect and be in force from and after its passage."

As an act relating to the St. Paul & Pacific R. Co., this act is expressly made a public act by the act of March 2, 1865, entitled "An Act to aid and facilitate the completion of the Saint Paul & Pacific Railroad and branches," which enacts.

"Sec. 4. This and all acts relating to the St. Paul & Pacific Railroad Company, and to the lines authorized to be constructed by them, are hereby declared to be public acts." And the original charter (Laws 1857, Ex. Sess., *c.* 1,) is delared (§ 28) to be a public act.

This act put an effectual stop to any scheming on the part of the

representatives of the St. Paul & Pacific bondholders for the construction of this link from the time of its passage until, in the following January, it appearad that its repeal would be part of the compromise legislation of that session. (Carp's Report, 1877, pp. 504-5.)

MR. FARLEY'S LETTERS OF JUNE 3D AND AUG. 23, 1876.

Defendants next attempted to refresh plaintiff's recollection of the nature of the conversation between Messrs. Kittson and Hill and Barnes, in April, 1876, as reported to him by Barnes, by means of his own letter of June 3, 1876, referred to in Mr. Barnes' letter of June 9th, and to which the latter is an answer.

This letter, of which plaintiff had kept no copy, (Defts.' Ex. 139, p. 1492,) was shown to him and identified by him as wholly in his own handwriting (1357, Q. 36-8.)

The letter (omitting the printed heading,) is as follows:

"St. Paul, June 3d, 1876.

"J. S. Barns Esqr

"Major Thompson has Spoken to me once or twice about Refunding to Bishop Ireland the Amount he paid for ¼ Section land for Town site near De Graff. Shal I do it.

"N. W. Kitson is geting anxious about the Big Operation of Geting control of 1st Div. Also Extension Lines. He can get the money. What do you think can be done. you have his proposition in your Memory. I would again say to you I think there is a big thing in Main Line 3 and 6 milion Bonds at their present Selling price.

"Yours, &c.,

"J. P. FARLEY"

This letter was offered and received in evidence, being of course first submitted to the inspection of plaintiff's counsel. (1357.)

After plaintiff had explained the first paragraph of the letter, the second paragraph was read, and he was asked (1358, Q. 41,) what he meant by "the Big Operation of Getting control of the 1st Div. Also Extension Lines." And he answered:

A. Well, *I have no recollection, unless it was in connection, as I have stated, to finish the lines. To the best of my knowledge, I never heard Mr. Kittson or Mr. Hill talk about buying them bonds until after that date.*

Q. 42. In this letter you further say: "He can get the money. What do you think can be done. You have his proposition in your memory." What proposition did you understand Mr. Barnes had in his memory, and what proposition did you refer to in this letter?

A. I have no recollection of anything further than I have already stated, that there had been a good deal of talking about Mr. Kittson getting money from Donald A. Smith to finish these extension lines, but as to any further operation, I am not aware of it. Don't know what it means.

Q.. 43. Will you please explain how the building of the Breckenridge-Barnes link and finishing the extension lines would give Mr. Kittson control of the First Division, or how you understood that that would give Mr. Kittson control of the First Division?

A. Well, I do not know that I did understand it, sir. It certainly would not give him control of this end of the line, unless there was a contract to that effect; but I have reference to the purchase of the bonds. *I never heard it mentioned until a later date than that.*

Q. 44. I call your attention to the last paragraph of the letter: "I would again say to you I think there is a big thing in Main Line 3 & 6 milion Bonds at their present selling prices." Why did you write to Mr. Barnes this last paragraph of the letter?

A. Well, I couldn't tell you now, sir, because I don't recollect. I know I had no money to buy the bonds, and I have no recollection of Mr. Barnes wanting to buy them. If he had, he never mentioned the fact to me.

This letter and Mr. Barnes' letter of June 9th in reply to it, conclusively show, in corroboration of Mr. Hill's testimony, that during Mr. Barnes' visit in March-April, Messrs. Kittson and Hill had conversations with Mr. Barnes regarding the purchase of the bonds, which conversations the latter did not "hoot at," but "had constantly in mind." It also shows conclusively that plaintiff, when he wrote it, *knew* that Messrs. Kittson and Hill had had these conversations with Mr. Barnes, and had made to him what plaintiff calls a proposition—"you have his proposition in your memory."

That these letters are fatal to Farley's and Fisher's story of an enterprise suggested by them *in the summer of 1876*, carried along during that summer while Mr. Kittson's ignorance was being enlightened and his reluctance overcome by Fisher, especially on that long Sunday interview, ("The day I was in Mr. Kittson's

office it was a very hot day;" Fisher, 368, C. Q. 123,) until the final meeting in plaintiff's office, when "it was before we had commenced to have any fire, but it was cooler; it was a nice cool day"—that they show all this to be pure invention needs no argument to make it plain.

But even these letters were insufficient to make plaintiff remember or admit that Messrs. Kittson and Hill's talk with Mr. Barnes was about the purchase of the Dutch committee's bonds. He still persisted in his original story. It was not till the following day, after he had had a conference with his counsel and Fisher, that he admitted that the facts "must be" as the defendants had proved them to be.

Still the defendants did not relax their efforts to brighten up his recollection before the hour of adjournment, and they showed him another letter from himself to Mr. Barnes, dated Aug. 23, 1876, in answer to that letter of Mr. Barnes of Aug. 17th which he has not produced, but which is mentioned in Barnes' telegraphic answer (957) to Mr. Kittson's message of Aug. 16th, (Defts.' Ex. 44, p. 992.) This letter of Aug. 23d, is itself considerably earlier than the date of that meeting when the combination was formed, and Mr. Kittson reminded plaintiff that he was general manager for the trustees in possession—who took possession Oct. 9, 1876.

This letter is also an autograph, (*of which plaintiff had kept no copy,*) and is as follows, omitting the printed heading, (Defts.' Ex. 140, p. 1492.)

"St. Paul, Aug. 23d, 1876.

"J S Barns Esqr

"I leave Town for a few days. I Red your leter 17th to Friend Kitson he feels somewhat disapointed. The Old Gentleman has great confidence in the future of this Property if it could be obtained for the present Selling Price of the Bonds. His Friends who is expected to furnish the money has unlimited control of Canadian Politicks, It might become a Canady project, but that would be a mater of no moment to you or me if we could make some money.

"Yours &c

"J P FARLEY."

The letter was offered and received in evidence, being of course

shown plaintiff's counsel and inspected by them. The plaintiff was then asked for the letter from Barnes to himself, mentioned in it and just referred to, to which his counsel objected on the ground "that the letter which the complainant read *may have been written to Mr. Kittson* by Mr. Barnes!" (1360.)

Plaintiff's attention was then called (1360, Q. 48,) to the two last sentences in this letter, and he was asked in what manner he thought that he and Mr. Barnes could make some money in case Mr. Kittson and his friends should obtain the property, and he replies:

"A. Judge, I have no explanation to make. I do not recollect anything about how any money was to be made, for it is something that has entirely passed out of my mind—the whole thing. Just as true as there is a God in Heaven I don't know any more about it than the man in the moon. There must have been some talk with Mr. Kittson to bring this thing out."

In answer to Q. 54 and 55, (1361,) he says that the expression "It might become a Canady project" meant that "if paid for by Canadian interest or money, it might be so considered;" and "if the Canadian capital paid for it they would control things."

In answer to Q. 56, he says this letter must have been written "after the syndicate was formed at the office there that had been mentioned;" but "what induced the particular object of writing that, I don't know."

In Q. 57, his attention was called to the fact that the letter assumes that Mr. Barnes was already aware of Mr. Kittson's project, and he is asked: "Can you tell us at what time prior to this date of Aug. 23, 1876, you learned that Mr. Barnes had such information in regard to a plan of Mr. Kittson's for getting the property as to render this letter intelligible to him?" and he says (1361-2:)

A. During that summer there was a constant talk going on between Mr. Kittson and myself and Mr. Hill here about raising money *to finish these lines;* and as to the first date that Mr. Barnes knowed anything about this syndicate of Mr. Kittson and his associates, my impression was that he knowed nothing about it until he was here with Mr. Carp; *but, as I said when we formed that syndicate,*—Mr. Hill, Mr. Kittson and myself formed that syndicate, —*I said then and there* (here is Mr. Hill to hear it) *that John S. Kennedy & Co. were going to be the great factors in trying to*

get these bonds; the Dutchmen would never sell the bonds until it was recommended by John S. Kennedy & Co.; and I said they were very dear men, but they had to be interested in some way to recommend this thing before the bonds could be purchased of the Dutchmen; and no doubt his letter here was a feeler to that object. But when Mr. Barnes first knew this thing, my impression was—I know when I made known to him in the February following, he made light of it; didn't think Mr. Hill and Mr. Kittson could raise any such amount of money; laughed at it; ridiculed the idea.

It thus appears that among "the facts, information and advice" which plaintiff's superior knowledge and intelligence enabled him to furnish, and which "were indispensable to the success of the enterprise," was the information that J. S. Kennedy & Co. were purchasable but expensive, and that the first step towards obtaining the bonds must be to corrupt the agents of the bondholders, without whose recommendation the bondholders would not sell. And that another term is introduced into the agreement, Kennedy & Co. are to be bought. And that besides the interest to be given Messrs. Smith and Stephen for procuring the money, another interest must be used as a corruption fund, reducing still further the residue left for the plaintiff, Messrs. Kittson and Hill.

This advice, however, was not taken, and no attempt was made by Messrs. Smith, Stephen, Kittson and Hill to make Mr. Kennedy interested in their enterprise. On this point Mr. Kennedy's testimony in this case, and his deposition in the Sahlgard case, introduced by plaintiff, are conclusive, to say nothing of the decree in that case, rendered, too, against the testimony of this plaintiff that he was himself interested.

Sahlgard v. *Kennedy*, 13 Fed. Rep. 242.

Plaintiff was next asked, (p. 803-4:)

Q. 58. You have stated that Mr. Barnes was here in St. Paul in April, 1876, and was not here again until he came out chicken shooting. If, prior to Aug. 23, 1876, Mr Barnes had become so far informed of Mr. Kittson's plan mentioned in this letter that this letter would be intelligible to him, are you still prepared to say that the matter of such plan on the part of Mr. Kittson was not talked over between yourself and Mr. Barnes when Mr. Barnes was here in April, 1876?

A. *I do not think it was, sir. I have no recollection of it.*

With this last, unavailing effort to refresh Mr. Farley's memory his examination ended for the day, leaving him free to seek enlightenment from other sources.

It may be here remarked:

1. As to Mr. Barnes' visit in "chicken time" (Farley, 1355, Q. 28.) By the statute in force in 1876, the shooting of prairie chickens was permitted only after the 14th of August. Laws 1876, c. 38, § 4, p. 168. Mr. Barnes was in New York August 17th when he telegraphed Mr. Kittson and wrote to plaintiff the letter which elicited plaintiff's letter of Aug. 23d. Plaintiff also introduced a letter of Mr. Barnes, dated New York Aug. 18th. (Plff.'s Ex. 96, p. 258.) So that Mr. Barnes' visit must have been subsequent to August 23d.

2. As to how plaintiff meant to make money.

In the letter of June 9th he writes: "I would again say to you I think there is a big thing in Main Line 3 and 6 milion Bonds at their present Selling price."

In the letter of Aug. 23d, he writes: "It might become a Canady project, but that would be a matter of no moment to you or me if we could make some money."

It will be shown that as soon as it appeared that Messrs. Kittson and Hill's proposition subsequently made would be accepted by the Dutch committee, plaintiff proceeded to buy outstanding bonds and committee's certificates on his own account, some of which he afterwards sold through Kennedy & Co. to the syndicate. And this was doubtless what he had in contemplation when he wrote these letters of June 3d and Aug. 23d.

FOURTH..

THE PLAINTIFF'S ABANDONMENT OF HIS ORIGINAL STORY.

On the following day (July 12, 1888,) plaintiff's examination was resumed.

In the interval his recollection had been aided.

"My attention has been called by my attorneys, sir, to the fact that there must have been some error in my original deposition." (1367, Q. 69.)

Q. 70. Have you had any talk with Mr. Fisher since you gave your testimony yesterday in regard to this matter?

A. Yes, sir. I saw him this morning a few minutes.

Q. 71. Did you talk it over with him this morning?

A. The subject was mentioned, Judge.

The witness desires to see the letters of June 3d and Aug. 23d. (1365.) He says he kept us copies of them, and complains (1369) that they were "sprung" upon him the day before. But see 1370, Q. 79-82. He had both letters in his hands, and examined them as long as he wished to.

Those letters say nothing about any *agreement of plaintiff with Messrs. Kittson and Hill*, but merely refer to communications of those gentlemen with Mr. Barnes about a scheme of their own, and communications between Mr. Barnes and Mr. Farley on the same subject. But on inspecting the letter of June 3d, Mr. Farley is "satisfied" that the interview when the alleged agreement was made "must have been previous to the third day of June," but how long previous he cannot tell. (1365, Q. 63-5.)

The same letter also *satisfies* him that Mr. Kittson did *not* remind him, at that interview, that he was general manager for the trustees in possession. (1365-6.)

And he is also "satisfied that Mr. Fisher as well as myself has got that date entirely wrong." (1368, Q. 75.)

Q. 89, p. 1372. What is now your best recollection as to whether you talked with Mr. Barnes, when he was here in March and April, 1876, as to the plan or project which Mr. Kittson and Mr. Hill had communicated to him of purchasing the bonds held by the Dutch committee?

A. Well my impression now is that I must have said something to him, but Capt. Barnes never entertained the proposition at all.

Q. 90. Then you think, do you, that it is possible that Mr. Hill in his testimony may have been correct, notwithstanding that it was a surprise to you, when he stated that he had talked with Mr. Barnes at his visit here in March and April in regard to his plan or project for purchasing the bonds held by the Dutch committee?

A. I think very likely, sir, that he must have had some talk with him, or Mr. Kittson did.

In Q. 91 (p. 1372,) he was asked to "fix as nearly as you can the date of the interview between yourself, Mr. Kittson and Mr. Hill and Mr. Fisher when you formed your combination?" *And we call attention to the answer:*

A. Very soon after I took possession of the First Division property [which was March 13, 1876,] and moved my office down to the building that was occupied by the First Div. Co., I became acquainted very soon thereafter with the financial condition of that company. That was as natural for me to do as it had been to manage the property. And *soon after that*, no doubt, a running talk *commenced*, you know, about this matter of buying the bonds, etc.; but I couldn't give you any date, Judge, that this interview took place, only I am satisfied now that it must have been before the third day of June.

Q. 92. You now remember clearly, as I understand it, that the matter must have been talked between you and Mr. Barnes when Mr. Barnes was here in March and April, 1876?

A. *I have no distinct recollection, of it*, sir, but I have no doubt it was the fact.

Q. 93. Was your talk with Mr. Barnes during his visit here in March and April, 1876, before or after your meeting with Mr. Kittson and Mr. Hill and Mr. Fisher when the combination was formed?

A. *If I talked with Mr. Barnes about* the purchase of these bonds, *it must have been after the combination was formed.*

And again in answer to Q. 94, (p. 1373:) "I have not testified that I did positively have a conversation with Mr. Barnes, but from that letter *I am satisfied that I had some conversation previous to that date.*"

Q. 104. (1375.) Mr. Farley can you swear positively whether your syndicate was or was not formed during the 10 or 15 days that Mr. Barnes was here?

A. I cannot swear.

Q 105. Have you any recollection at all about it?

A. I recollect the formation of it, but the day it was done I couldn't tell you.

Q. 106. Have you any recollection at all, *within a month*, of the date when the syndicate was formed?

A. This thing was talked before and after continuously, up to the purchase of the bonds, but as to fixing any date or any month, I would not feel safe in doing it.

Q. 107. Can you name any period of *six months*, within which you can say this syndicate was formed?

A. Well, sir, judging from this letter, I should say it was before the third of June, 1876. That is the best light I have on the subject.

On pages 1367-1371, Q. 72-85, he is confronted with Fisher's positive statements when a witness for plaintiff, and with his own unqualified statements, some made as a witness for himself, and others (already quoted at large) only the day before, on his examation by defendants.

At the very outset of this case plaintiff exhibited his readiness to contradict his sworn statement is his former suit, and make his pleadings and his testimony conform to what the supreme court said must be pleaded and proved to make a case. And his testimony just quoted shows that there is no statement too positive for him to make in support of his case, and no statement however positively made that he will not take back, whenever the exigencies of his case require it.

And so with Fisher. He in effect admits that all the details of time and place by which he gave an air of truthfulness to his original story were pure inventions.

Plaintiff called him (on Oct. 8, 1888,) and he testified as follows *in rebuttal*—but to rebut what except his own testimony and plaintiff's?—and he says: (1657-8:)

Q. 17. Please look at the letter addressd to Mr. Barnes, signed by Mr. Farley, dated June 3, 1876, which has been introduced in evidince as Defendants' Exhibit 139 in this cause, and examine the same, and state whether, upon such examination, you can now fix *any more definitely than you did in your testimony last autumn* the date when the conversation occurred between Mr. Kittson, Mr.

Hill, Mr. Farley and yourself, of which you testified last autumn? [As if Fisher had not been "*definite*" enough!]

A. The statements in that letter convince me that those conversations were had before the letter was written.

Q. 18. Can you state, and, if so, please state, at what date before this letter was written the said convsrsation occurred between Mr. Kittson, Mr. Hill, Mr. Farley and yourself, of which you testified last autumn?

A I would not undertake to give the date, but it must have occurred between the time that Mr. Farley took possession of the First Division and the time this letter was written.

This was not a letter written by Fisher. It does not appear that he ever saw it until after the defendants put it in evidence. It contains no reference to the pretended agreement. There is nothing in it to refresh Fisher's memory, or aid his recollection, any more than it would "refresh the memory" of the court. And it does not appear that after reading it his recollection was different from or clearer than his recollection the autumn before. But the letter does "*convince*" him as it would convince a court that unless the agreement was made before that letter was written it never could have been made at all. Mr. Fisher was "convinced" that nothing could save plaintiff's case but carrying forward the agreement to a date prior to June 3d, and he does it.

The counsel for defendants did not deem it necessary to cross-examine Mr. Fisher on these statements.

PLAINTIFF'S NEW THEORY OF (1) MESSRS. KITTSON AND HILL'S ENTERPRISE, AND (2) THE PRETENDED AGREEMENT, AND HIS EXCUSES FOR THE ORIGINAL TESTIMONY.

The Western Railroad Theory.

Near the close of his case, and on October 13, 1888, plaintiff introduced (1694) the articles of incorporation of the "Western Railroad Company of Minnesota," filed January 31, 1874, (Plff.'s Ex. 241, p. 1730,) and in the argument in the circuit court it was claimed that it was the enterprise of this company, in which they were incorporators, and not any plan for buying the bonds, etc., that must have occupied Messrs. Kittson and Hill, and occasioned

all Mr. Hill's and Mr. Newel's researches, and all their consultations with Mr. Young, during the years preceding Mr. Hill's first talk with Fisher, the Breckenridge-Barnes link having proved unequal to the burden laid on it of accounting for Mr. Hill's proceedings.

1. A reference to the articles of incorporation and a glance at the map show that the projected lines of that company, except the short piece between Brainerd and Sauk Rapids, have nothing to do with *any* of those involved in this case, and that none of them has anything to do with the *First Div. Co.* or its lines. Mr. Hill's researches prior to May, 1875, and his frequent discussions from that day forward, with Mr. Newel and Mr. Young, of the matters embraced in the printed records, etc., furnished by the latter, are clearly proved. Was all this in aid of a line from Brainerd to Mankato, or from Little Falls to Big Stone Lake, or merely for amusement?

2. If Mr. Kittson and Mr. Hill's project in 1874-5 was merely the enterprise of the Western R. R. Co., why not *prove* the fact by some of the directors named in the articles? Why did not plaintiff call C. W. Griggs, L. E. Reed, P. H. Kelly, all prominent citizens of St. Paul in 1887-8, all directors in the company with Kittson and Hill, to *prove* what Mr. Hill's enterprise was? Why not for once produce some witness besides Farley and Fisher?

3. Not until 1877 did the Western R. R. Co. begin operations. Mr. Kittson was made vice-president much to the alarm of his "associate" this plaintiff, who straightway informed Mr. Kennedy of it. (Deft.s' Ex. 81, 82, pp. 1013-4.) So late as June 8, 1877, and after active negotiations for the purchase of the bonds had been initiated by the letter of May 26, 1877, it was possible for Mr. Kittson to be an officer in the Western R. R. Co., *and at the same time* engaged in active negotiations with the Dutch committee for the bonds.

The New Theory of the Pretended Agreement.

As advanced in the circuit court, this theory was that Fisher's *first* talk with Mr. Hill was *prior* to March 13, 1876. That in *that* talk the St. Paul & Pacific bonds only were mentioned. That after this and perhaps other preliminary interviews, (all prior to March 13th,) Mr. Hill, as a consequence of them, and to get Mr. Smith to furnish the money, made his trip (starting March 17th) to Ottawa, and on his return with Mr. Barnes, (March 27th,) he was able to and did satisfy Mr. Kittson, so that the latter was able to and did assure plaintiff and Fisher that Mr. Smith and Mr. *Stephen* would furnish the money to buy, *not only* the bonds secured on the extension lines, but also the bonds secured on the *First Div. lines*. That the final interview where this assurance was given and the agreement made (and this was *the first* interview at which plaintiff and Mr. Kittson were both present) was during Barnes' visit to St. Paul, for it was not till after the agreement was made that Messrs. Kittson and Hill could have spoken with Barnes about buying bonds. And counsel went so far as to claim that this theory was sustained by the letter of June 3rd, and that that letter was really a support to their case.

1. Of course any such theory gives the lie to Fisher's minute statements as to the weather and the progress of the seasons, and the testimony as to "the trustees in possession," and "the Litchfields, Mr. Bigelow and Mr. Becker fighting for possession," and as to Mr. Kittson's statements about the great changes plaintiff had made in the property since he had managed it, and his unwillingness that it should "go back to the former management," and his want of "confidence in the former management."

2. The original testimony of plaintiff and Fisher that all the talks, including the first, were in the First Div. building; that Mr. Hill's *first* talk with plaintiff immediately followed his *first* talk with Fisher; that in the *first* talk with plaintiff Mr. Hill said that he had talked with Fisher about the price of St. Paul & Pacific and First Div. bonds, and that *at that time* "Mr. Fisher through me was familiar with the bonds on each piece of property,"—is discussed *supra*, pp. 58-60.

In his very latest testimony, after his change of dates, plaintiff says: (1415, Q. 289; 1419, Q. 304) that before he had any talk with Mr. Hill (and hence before Mr. Hill's first talk with Fisher) he and Fisher had done the "figuring" on the *First Div.* bonds as to which he has testified, and for which he had no material prior to March 13th. And this testimony and his confession in his original testimony as to his (and therefore Fisher's) ignorance of *First Div.* bonds, etc., until sometime after he took possession on or after March 13, 1876, which is discussed page 31, *supra*, (and which appears again in his latest testimony, 1372,Q. 91; 1385, Q. 152-154; 1411-3, Q. 275-280, 288; 1419, Q. 304; 1420, Q. 306-312,) show that it was impossible for even the *first* talk between Mr. Hill and Fisher (taking place, as he says, in the *First Div. building*) to have been prior to March 13th, or prior to a date considerably later than March 13th, even had all parties been in St. Paul. But plaintiff and Fisher were out on the road March 14-17, inclusive, (*supra*, 33-4;) Mr. Hill went to Ottawa March 17th and returned with Barnes on the 27th. And even if by the 27th the plaintiff and Fisher had acquired the information which on March 13th they confessedly did not have about First Div. bonds, etc., how could all the interviews have taken place (including the Sunday one at Mr. Kittson's office) which plaintiff and Fisher say occupied at least a month, and how could the final interview be had and be followed by those conversations with Mr. Barnes, of which he writes that he has them "constantly in mind"—and all this between March 27th and a date not later than April 15th at the farthest?

3. But suppose Fisher had had the pretended first talk with Mr. Hill before the latter went to Ottawa, and that first talk had been limited to the St. Paul & Pacific or Extension bonds. The claim that thereupon Mr. Hill went to Ottawa in furtherance of Fisher's scheme, and returned with the assurance that Mr Smith and Mr. Stephen would furnish the money, is not only false but absurd.

On this or any theory, Fisher, before Mr. Hill's trip to Ottawa, had given him no information about the *First Div.* bonds, etc., and plaintiff's case requires that neither Mr. Hill nor Mr. Smith could have any information on *First Div.* matters except as derived

from Fisher. Mr. Hill must have gone to Ottawa ignorant alike of those matters and of any scheme to buy First Div. property or bonds. And yet on his trip to Ottawa, and in a single breakfast-talk, Mr. Hill not only induced Mr. Smith to promise whatever money might be needed to buy the *Extension* bonds. He did vastly more. Ignorant of any scheme or project for purchasing the *First Div.* bonds; without any idea of any such purchase; ignorant of the number, kinds, or amounts outstanding of the various issues; ignorant of their market price; ignorant of the mortgages securing them, and the property which gave them their intrinsic value—he yet, in that conversation, persuaded Mr. Smith to agree *also* to furnish the unknown millions that might turn out to be needed to buy these First Div. bonds—an unknown quantity, secured (if at all) by unknown mortgages on property of unknown amount or value. And he returned with such positive assurances that Mr. Kittson was able to state with confidence that the money would be furnished by Mr. Smith and Mr. *Stephen* through the bank of Montreal. And plaintiff, who knew Mr. Kittson to be "a very careful man," and "entitled to a great deal of credit in all that he said or done," had entire confidence in the statement. Can anything be more absurd?

And the new theory of Mr. Hill's success at Ottawa receives a flood of light from the testimony of Sir Donald Smith, that at this March meeting he would go no farther than to authorize an inquiry of the committee as to prices for their holding, and that, without satisfactory information on this point, he "should never have dreamed, as a business man," of laying the matter before friends; and that he never expected to get the money from or through the Bank of Montreal; (1133-4, Q. 44-6;) and that he did not mention Mr. Stephen's name to Messrs. Kittson or Hill as a person interested in the project, until May, 1877. (1139-1140, Q. 70-3. And see Stephen, 1229, Q. 24.)

And if Mr. Hill went to Ottawa in furtherance of Fisher's proposed scheme, and if the agreement was made while Barnes was in St. Paul, and was followed at once by negotiations with him, we ask:

1. Why did plaintiff and his counsel, throughout the testimony, (even down to Mr. Alexander's examination, following Mr. Farley's,

in July, 1888,) try to discredit the evidence of that trip? (Smith, 1163-5, C. Q. 61-8; Alexander, 1475-6, C. Q. 1-14.)

2. When asserting an agreement made in the autumn, why did they try to show that Mr. Smith might have been in St. Paul in October, and that Mr. Hill might have met him and Mr. Stephen on his visit, in the autumn, to the Centennial Exposition? (Hill, 787-8, C. Q. 590-4; Smith, 1185-7, C. Q. 191-204; Stephen, 1265, C. Q. 10.)

3. If the agreement was made while Barnes was in St. Paul, why was not the fact of his presence mentioned at that interview?

Plaintiff says that he then told the others that they must buy J. S. Kennedy & Co. before buying the bonds, and could not get the latter without the former. (1361-2, Q. 57.) And in the same answer he says of his letter to Barnes of Aug. 23, 1876: "No doubt this letter here was a feeler to that object." Why, then, was not Barnes' opportune presence mentioned? Why did not plaintiff then approach him in conversation, instead of waiting until August to "feel" him by letter?

4. If the agreement was made before Barnes' departure, why write, in the letter of June 3d: "I would *again* say to you I think there is a big thing in Main Line 3 and 6 milion Bonds at their present selling price?" Why write, on August 23, 1876: "It might become a Canady Project, but that would be a mater of no moment to you or me if we could make some money?" (1492, Deft.'s Ex. 139-140.)

The Excuses for the Former Testimony.

In the circuit court, it was argued that plaintiff and Fisher fell into innocent mistakes by trusting their unaided memory as to events of many years ago, their testimony being given before their memory was "refreshed" by the letter of June 3d. But (1) The letter contains nothing to refresh anyone's recollection of an *agreement*. It merely proves that plaintiff knew of defendants' negotiations for the bonds. (2). If plaintiff's recollection needed refreshing, it had already been refreshed by Mr. Hill's and the other testi-

mony. (3). The letter did not in fact refresh at all as to the one thing mentioned in it—the negotiations with Barnes and plaintiff's knowledge of them (1372-3, Q. 92-5.) And how could Fisher's recollection be refreshed by a letter he never saw (so far as appears) till defendants produced it in July, 1888?

(5.) In their first testimony they were not relying solely on their memories to carry them back over a long period of time. They had Barnes' letters of June 9 and 19, which they tried to palm off as referring merely to the cut-off. As early as March, 1879, when plaintiff first put forward any "claims," he knew that the defendants refused to admit them. In June, 1879, within three years, he brought his first suit, furnished his attorney with material for a complaint, and swore to it. And Fisher says he then made and furnished plaintiff *a written statement* of the same things he swore to in November, 1887. (1659, C. Q. 8, 9; 1660, C, Q. 16-20.) By the demurrer in the state court (July, 1879,) the subsequent decision (October, 1880,) and in the framing of his original bill in this cause (November, 1880,) plaintiff's attention was specially called to all matters connected with the alleged contract, and he made the affidavit on page 1735; and in December, 1881, he filed his amended bill. And on December 4, 1880, and again in March, 1882, he testified for plaintiffs in the Sahlgard and Stricker cases as to the alleged agreement and when it was made. (149-152; 1362-3.) And "I have talked the matter over with Mr. Fisher frequently ever since the difficulty commenced." (1367, Q. 72.)

And as to Fisher, it is absurd to claim that any lapse of memory was accountable for his inventions. When he went into all his minute details as to the seasons of the year, the temperature, the language used, he broke down his bridges; he left no way of retreat open. He was telling things which he either remembered or had invented to give credit to his story.

But even if the witnesses could be saved, it would not save the case. The fact would still remain that for more than two years Messrs. Kittson and Hill had been engaged with Donald Smith in *his* project, had, without plaintiff's aid and without his knowledge, reached the point of communicating with the Dutch commit-

tee through their agents—a point where they could have no possible reason for taking in plaintiff, especially if, as he says, they must also buy his employers, Messrs. J. S. Kennedy & Co. In such case they would certainly treat with the masters and not with the man. But they needed neither, and in their combination there was no place for plaintiff. On his own statement of the grounds on which he might be useful, he could be of no service.

As against the deathblow to Farley's and Fisher's credibility given by their putting the date prior to June 3d, there is no compensating advantage to their case, and no advantage whatever unless the date can be placed prior to the conversations with Mr. Barnes, which is impossible.

And between March 13th and any date in April, how could Mr. Kittson have said, as Fisher swears he said, in that Sunday morning interview, (*supra*, p 49.) "Mr. Farley has made a great change in that property since he has managed it, and we have got great confidence in him." And this, too, when the plaintiff makes it a main point in his case that Mr. Kittson knew nothing about a railroad, and produces Mr. Kittson's letter of Jan. 14, 1880, (the one letter that either of the defendants appear to have ever written to plaintiff,) to show Mr. Kittson saying, "I am no railroad man, and therefore any mismanagement of the road cannot be seen or observed by me unless it is directly pointed out to me." (Plff.'s Ex. 212, p. 1498.)

And how could plaintiff have made any such "great change in the property," or how could he have established that great reputation in Minnesota as a railway manager (which on March 13, 1876, he had yet to make) in the short interval between March 13th and Mr. Barnes' departure?

Plaintiff himself writes as late as May 22, 1876, that he is still a learner in regard to the railroad: "When here I spend Eighteen hours out of every twenty-four, *trying to understand* all about the machinery of the Road, and I find my old Phisical frame gets worn out much sooner than it used to." (Defts.' Ex. 144, p. 1494.)

Plaintiff, when asked by defendants what services he rendered that were indispensable to the success of the enterprise, said:

"Mr. Kittson would have nothing to do with it unless I would join them. * * * *Mr. Hill labored with me for weeks* to get me to go in on that account." (1417, Q. 294.) Between Mr. Hill's return from Ottawa, March 27th, and Mr. Barnes' departure, about April 15th, how could Mr. Hill have labored "for weeks" with plaintiff to induce him to join?

On plaintiff's own testimony, given *after* his change of base, the agreement with plaintiff (without which, he says, Mr. Kittson would not touch the scheme) could not possibly have been made before Mr. Barnes' departure, and yet Mr. Kittson was engaged in the enterprise for acquiring the bonds and property and was trying to get prices of bonds from Mr. Barnes, during the latter's visit.

Plaintiff says, and very truly, that he "would not feel safe" in naming any month as that in which the agreement was made, and when asked, "Can you name any period of *six months* within which you can say this syndicate was formed?" He says: "Well, sir, judging from this letter, I should say it was before the 3d of June, 1876. That is the best light I have on the subject." (1375, Q. 106-7.)

But the letter of June 3d says that "N. W. Kittson is *getting anxious* about the Big Operation." Mr. Kittson would hardly become anxious immediately upon engaging in it. If he was then anxious, he must have engaged in the project some time before. And if he did not engage in it until the alleged agreement, that agreement must have been made a considerable time—at least a month—before June 3d. As Mr. Fisher could not possibly have had his first talk with Mr. Hill prior to the latter's return from Ottawa with Barnes, (March 27th,) this would give about five weeks between that date and May 3d. But on April 25th plaintiff writes (Defts.' Ex. 143, p. 1494) that "Our Mr. Fisher will leave to-morrow morning to open up the Red River line." And on Saturday, April 22d, plaintiff has just returned from a visit to Iowa and Chicago, having been absent, *not* a few days only, but "a few days longer than I expected." (Plff.'s Ex. 43, p. 219.)

Other absences prior to June 3d appear from plaintiff's letter of Monday, May 22d, (Defts.' Ex. 144, p. 1494:) "I was absent last

week 5 days. * * * Our Mr. Fisher goes north again this P. M. Will be absent week or 10 days."

It is not possible to include all the interviews described by Fisher —including the "very hot" Sunday when he gave a schooling to Mr. Kittson and afterwards reported to plaintiff, and the following Sunday, when he told plaintiff there was no harm in his joining in the project—within the period from March 27 and a date so long prior to June 3d that Mr. Kittson was then "geting anxious."

And why should Mr. Kittson be "geting anxious" at all? He could "get the money." Why should Mr. Kittson be "geting anxious," even if he had no definite reply from Mr. Barnes, so long as he had plaintiff to tell him just what to do, and to make everything right with Mr. Carp, one of the committee, of whose intended coming the plaintiff was advised?

And it is hardly consistent with the existence of the contract—or even of negotiations—by which plaintiff placed his official head at the mercy of Mr. Hill, and which involved, necessarily, the closest relations between the parties, that, between Mr. Barnes' departure and May 8th, plaintiff should have exerted his official powers to deprive Mr. Hill of his freight-handling contract, and also of his more valuable monopoly of the wood traffic on the main line, at the same time writing to Mr. Barnes as to the quality of the wood furnished the company by Mr. Hill in terms by no means flattering to that gentleman. (Plff.'s letters of May 8th and May 22d. Ex. 47, p. 221; Ex. 50, p. 223.) See pp. 35-6, 68-9, supra.

The value of this wood monopoly appears from Mr. Hill's testimony that it furnished about 30 per cent. of the traffic of the road; from the circumstance that the existence of it is one of the charges made by the bondholders against the company in their bill in the circuit court for a receivership, (Defts.' Ex. 5, p. 856) and in Carp's report in 1877; and its abolition is accounted one of plaintiff's great services.

The Sending of a Man to Holland.

The changing of the date of the pretended agreement to any time prior to June 3d, even makes yet clearer the falsity of the circum-

stantial account of Mr. Hill's purpose of sending a man to Holland to buy outstanding bonds in open market. Plaintiff's original testimony on this point is quoted *supra*, pp. 55-6.

The story is important only from the fact (1) that it furnishes one of the only two specific instances which plaintiff is able to state when he furnished any information or advice, or rendered any assistance in the enterprise—the other instances being the advice to buy J. S. Kennedy & Co., because indispensable and purchasable, though expensive "factors," (*supra*, pp. 112-3;) and from the fact (2) that the proof shows not only the falsity of the story, but what suggested it and how it was manufactured.

Plaintiff's case required that he alone should know what bonds to buy and how to reach them—how to open communication with the committee. It required that, upon the making of the agreement, plaintiff, having direction of the enterprise, should without delay put the others in communication with the committee. And if it should appear that Mr. Hill was destitute not merely of special knowledge as to the bonds, but of ordinary business sense, that he was about to go on and buy outstanding bonds in small lots in the open market instead of aiming for the committee's bonds, and was only restrained by the superior knowledge and wisdom of the plaintiff—why all this would show that plaintiff was the only one of the three capable of conducting the enterprise he had originated, would magnify his importance, and—what seems to be a principal aim of plaintiff throughout the case—show Mr. Hill to be a person of mediocre intelligence, no experience, and little judgment. Plaintiff had in his possession two letters from Kennedy & Co. of Nov. 15 and Nov. 24, 1876, which he has introduced, the first telling him of Carp's arrival that day in New York, and that he might visit St. Paul, the second that he was starting for St. Paul. (Plffs. Ex. 104, 105, p. 263.) On Mr. Carp's arrival in St. Paul, plaintiff did introduce him to Messrs Kittson and Hill, who had dealings with him that will be hereafter recounted.

An incident like that in question, occurring between the making of the agreement in October and Carp's arrival at the end of November, and after plaintiff had advices that he was coming, would

certainly be opportune, and would serve at all points the exigences of plaintiff's case. It would show the promptness with which the enterprise was launched after it was agreed on, and also the extent and value of the plaintiff's *exclusive* information.

Accordingly plaintiff and Fisher, in *their original* testimony, both put the incident very soon after the making of the agreement, (in October,) and "some weeks" before Carp's arrival, who "was expected to arrive in St. Paul very soon," and of whose coming the plaintiff then "had advices." (*Supra*, p. 55.) And part of their testimony would seem to be corroborated by the "advices" in the letters, (the earliest dated Nov. 15th and reaching St. Paul the 18th,) which could have been introduced *for no other purpose*.

But when the agreement is put prior to June 3d, then if the incident is left as happening *after* the advices of Nov. 15th, there was certainly an unwarrantable time elapsed before plaintiff set the enterprise in motion, or took any steps toward putting his associates in communication with the committee or telling them which bonds to buy. On the other hand if they should still claim that the incident happened soon after the making of the agreement, (some time in April, and in any event before June 3d,) the "corroboration" of the letter of Nov. 15th is lost, and there is *no letter* to show that Carp "was expected to arrive in St Paul very soon," or that plaintiff "had advices then that Mr Carp was coming."

After the attempted change of date for the agreement, the plaintiff is naturally very reluctant to fix any date for the incident—even within a month. (1424-5, Q. 326-9.) But he had stated in his first testimony that in conversation he told Mr. Hill that Carp was expected to arrive very soon. He loses the "corroboration" of the letters, and must show that he had advices on that point other than the letters; otherwise the incident must be put after Nov. 18th, an improperly long time after the agreement, so long that it could not be truthfully said it was "not a great while after the syndicate was formed," or that it was merely "some weeks" before Carp's arrival at the end of November.

Accordingly, on "cross-examination" by his counsel, the following testimony is elicited from plaintiff:

"C. Q. 2. Had you, at the time of the last mentioned conversation, news that Mr. John Carp was to be expected out here?" "A. Yes, sir, I think so; Mr. John Knuppe, a brother-in-law of Mr. Carp's, was a clerk in my office, and had, as I understood him to say, much correspondence with his brother-in-law, Mr. Carp. I cannot now state how I learned the fact, but I recollect of saying to Mr. Hill that Mr. Carp was to be here." (1425-6.)

This would seem to permit the incident to have occurred within a few weeks of an agreement made in April, though it suggests the question, *Why was not Knuppe called?* He was in St. Paul, was employed by plaintiff to translate the exhibits to Carp's deposition, (481-2, 528). If ever testimony needed corroboration, it is that of plaintiff and Fisher, and on this point and some others their testimony, if true, *might have been corroborated by him and others.* (See Fisher, 352, Q. 122-4; 402, C. Q. 455.)

But the testimony is not true. Knuppe did not become Carp's brother-in-law till the summer of 1877. (Defts. Ex. 83, p. 1015.)

On June 21, 1876, the plaintiff, in a letter to Carp annexed to Carp's deposition, shows he had no knowledge of Carp's coming. (Ex. C., 482.)

Carp arrived in New York, November 15, which means that he left Utrecht about Nov. 1st. In his long report to the committee, made in 1877, and introduced by plaintiff, he says that his visit to America was to give his deposition in the Extension line foreclosure suit, with a view to a hearing at the December term, 1876, and "at your request, I left for America early in November last, *in great haste, only three days after the communication thereof.*" (494.) And on his arrival in New York (Nov. 15th) Kennedy & Co. can only say that he "*may possibly* pay you a visit at St. Paul before he returns home."

Plaintiff could not have had the information of Carp's coming which he says he gave Mr. Hill in the conversation till November 18th. The story was plainly invented to fit the letters of Nov. 15 and 24, and an agreement made in October, and it cannot (any more than the agreement) be removed to an earlier date.

And why should plaintiff wait from April until November before taking the first step to put Messrs. Kittson and Hill in communica-

tion with the committee?—especially as Barnes, in April, "hooted at" their proposals.

Why did he wait until November before telling these gentlemen, (who in April, orally, and on Aug. 16th by telegram, had been inquiring of Barnes if the committee would sell.) that the bonds to buy were the committee's and not outstanding bonds?

This wholly fictitious incident is simply another instance where plaintiff and Fisher, in trying to construct a story that should be consistent with the actual and known facts, and be consistent with and derive support from the letters in plaintiff's possession, have been led by their ignorance of the real facts into inventions the falsity of which is demonstrated by unquestionable testimony and records, which show not only that their stories are not but that they cannot be true. Other and as flagrant instances occur in their versions of transactions subsequent to the alleged agreement, which transactions next claim attention.

FIFTH.

HISTORY OF THE ENTERPRISE FROM THE SUMMER OF 1876 TO ITS SUCCESSFUL CONCLUSION.

After a quite unimportant episode in December, 1876, and January and February, 1877, when Messrs. Kittson and Hill, without the concurrence of Mr. Smith, made an offer for the lines of the First Div. Co., in accordance with a plan of Mr. Carp's, the evidence under this head embraces:

1. The first meeting between Mr. Hill and Mr. Stephen, in May, 1877, at which time the latter first became connected with the enterprise, and it was determined that Messrs. Kittson and Hill should ascertain if certain prices then concluded on would be acceptable to the Dutch committee.

2. The sending of a letter on May 26, 1877, by Messrs. Kittson and Hill to the committee, and the negotiations that ensued, and their failure.

3. The inception of new negotiations in January, 1878, and their prosecution down to the completion of the purchase of a majority of the committee's holding, on February 24, 1878, and the execu-

tion of the formal contract with the committee on March 13, 1878, and the final agreement between the associates on March 27, 1878.

4. The subsequent proceedings of the associates, including—

Their purchases of additional bonds and of the stock of the two companies.

The liabilities they jointly incurred and the obligations they jointly executed.

Their method of dealing with the outstanding bondholders and with the stockholders.

Their mode of dealing with plaintiff. Their use of Messrs. Kennedy & Co. in order to make their views and wishes known to and respected by plaintiff.

Their completion of the St. Vincent Extension lines under order of the circuit court.

5. And in this part of the case will also appear—

The use made of plaintiff by Messrs. J. S. Kennedy & Co. as their agent for communicating with Messrs. Kittson and Hill, in the earlier stages of the negotiations, by means of cipher telegrams.

Plaintiff's resort to Messrs. J. S. Kennedy & Co. for information as to the negotiations pending and the bargain made between the associates and the Dutch committee.

Plaintiff's ignorance of such negotiations and bargain and of the purposes of the associates, except in so far as he was informed of them by Messrs. Kennedy & Co.

Plaintiff's ignorance of the terms of the agreements between the associates, of the proportionate interests in the enterprise assigned thereby to Messrs. Smith and Stephen, and of the proportionate interest allotted to Messrs. Kittson and Hill, and in which plaintiff claims to have been equally interested with them.

The similar ignorance of Messrs. Smith and Stephen of any interest possessed or claimed by plaintiff in the enterprise in which they were engaged.

The prevalence of the same ignorance as to plaintiff's interest among all persons employed in or cognizant of the enterprise.

Plaintiff's own ignorance, down to Feb. 22, 1878, that he had any interest, as shown by his writing to Messrs. Kennedy & Co. that "it has been more than intimated to me that Mess. H. & K.

would be pleased to *make* me interested in their shares of what may result from this trade."

That so late as April, 1878, plaintiff sought Mr. Kennedy's advice as to whether he should try to obtain a renewal of this "intimation," and concluded not to do so.

Plaintiff's purchases of bonds and of committee's certificates in the summer of 1877, and his sale of the certificates to the associates, through Messrs. Kennedy & Co., in August, 1878.

Plaintiff's ignorance, so late as May 29, 1879, that he had anything more than "claims to share in the honors or profit, to some small degree."

The fabrication by plaintiff and his assistant of incidents and conversations that never happened and never could have happened. Betrayed by the half-knowledge gleaned from Kennedy & Co.'s letters, they have more than once fortified their principal invention by fictitious incidents and interviews, which in their ignorance they supposed would prove to be in accord with the real transactions, and show their participation in the conduct of the enterprise, and give color to their story as to its origin.

The Universal Ignorance of Mr. Farley's Interest.

The ignorance of Mr. Smith, Mr. Stephen, Mr. Kennedy, and all others in any way way connected with the enterprise of any interest of plaintiff therein, covers the whole period from the earliest date assigned for the agreement down to June, 1879.

And because this ignorance lasts through the whole period, and because of its very great significance, a brief discussion of it will serve as an introduction to the evidence that follows.

Mr. Galusha, Mr. Smith, Mr. Stephen, Mr. Newel and Mr. Kennedy, all state in the clearest terms that they never heard of any interest possessed or claimed by Mr. Farley until June, 1879. (Galusha, 1048, Q. 36; 1051, Q. 54-5. Smith, 1151-2, Q. 111, 112. Stephen, 1260, Q. 195-7; 1261, Q. 205. Newel, 1326, Q. 35 Kennedy, 1598, 1601, Q. 13.)

And although plaintiff says, (71, Q. 83, *supra*, p. 42,) that he "knew Mr. Hill to be a man that was very fond of talking," (and

see his testimony as to the peril into which he claims Mr. Hill brought the enterprise by "giving it away" to the newspapers,) yet no witness, beyond plaintiff and his assistant, testifies to any word or act of Mr. Hill having the slightest tendency to show that he recognized plaintiff as having any interest.

Nor is there a particle of testimony that plaintiff ever told anybody, or that anybody ever heard from any source, of this pretended agreement or of any *claim* of interest by plaintiff, until June, 1879, when the enterprise was substantially closed.

Plaintiff's friend Carp, with whom he had so much influence, and through whom and by whose advice he made his own bond speculations, and whom he called as a witness; his friend and Carp's brother-in-law, Knuppe, whom he employed to translate the exhibits to Carp's deposition; Mr. Barnes, with whom he had so much confidential correspondence, to whom he pointed out the "big thing in 3 and 6 milion bonds" if Mr. Kittson's "big operation" should succeed, and to whom he wrote: "It might become a Canady project, but that would be a mater of no moment to you or me, if we could make some money," and who told plaintiff so late as the spring of 1888, that "he had no objections to my being interested, only he thought I ought to have informed him," (1381, Q. 136)—All these gentlemen were in the same dense ignorance. Was ever secret so well kept?

In any case this would be an argument of the strongest kind against plaintiff's pretensions. But there are reasons which make Mr. Smith's, Mr. Stephen's and Mr. Galusha's ignorance conclusive against him.

If this agreement had ever been made, Mr. Kittson could not have failed to inform Mr. Smith of it.

1. In the first place they were becoming associates, and they were old and intimate friends. These reasons, even had there been no others, would inevitably have led to a disclosure at the outset, and certainly during the three years between 1876 and 1879.

2. But there were other reasons. Mr. Kittson, it is claimed, set a high value on plaintiff's association in the enterprise. He would not touch it unless plaintiff was in it to guide and direct. This is plaintiff's story, and it is also his story that Mr. Kittson,

after the agreement had been made by which he himself joined the enterprise, took that enterprise to Donald A. Smith, laid it before him, and induced him and Mr. Stephen to become associates, and to undertake to raise the millions needed to carry it out. Would not Mr. Kittson have been likely, on such an application, to set forth all the merits of the project, and among them the crowning merit—that plaintiff was interested and would be its guide and director?

3. And would not Mr. Smith and Mr. Stephen have the right to know in any case who their associates were, and would not Mr. Kittson and Mr. Hill most certainly, in any case, have told them?

4. Will it be said that it was agreed that plaintiff's interest should be kept secret? True, plaintiff says so and that Mr. Kittson himself suggested the secrecy at a time when "it was in the law for the possession of the property," and when he was "general manager for the trustees in posssession"—that is, after October 9, 1876. But according to plaintiff's latest version, the agreement had then been on foot nearly six months, and Mr. Kittson would hardly have delayed so long as that in laying the matter before Mr. Smith,—and laying it before him at a time when the need of secrecy had not become manifest to Mr. Kittson, and had not been insisted on by him, and it had not yet been "sacredly agreed" that secrecy should be maintained.

And during this six months that elapsed before the need of secrecy occurred to any one, would not this thing, which no one had any reasons to keep secret, have been mentioned to some person? Mr. Hill continually spoke of his enterprise, mentioned it to Newel, Upham, Saunders. How did it happen—especially during this period—that he never mentioned plaintiff's connection with it?

5. But the very need of secrecy made it the duty of Mr. Kittson to inform Mr. Smith and Mr. Stephen. They had a right to know that the feature in the enterprise which was its greatest charm was liable to be lost to it by a careless word. They had a right to know of this risk.

Mr. Kittson, as plaintiff says, knew that plaintiff's interest, if known, would lead to his removal as receiver. And from this it necessarily follows that he must have known that if plaintiff was

secretly interested in the purchase of a road of which he was receiver, or in the purchase of a road of which he was general manager for trustees in possession, that fact alone, if discovered would vitiate the sale.

That it would vitiate the sale—that such a sale would be avoided at the suit of outstanding bondholders, on proof of that fact, and without further inquiry, is unquestionable. *Sahlgard* v. *Kennedy*, 2 Fed. Rep. 295.

And hence in the suits by outstanding bondholders to set aside the First Div. sales, the plaintiff's counsel (who were at that time Mr. Farley's counsel, also, in this litigation) called Mr. Farley to prove his own secret interest, and he swore that he was interested. If the court had believed him, the sales would unquestionably have been set aside. But the court did not believe him. (Farley, 149-152, C. Q. 170-182; Plff.'s Ex. 245; Deposition of Mr. Kennedy in Sahlgard suit, in answer to Farley, 1747-1750, Q. 23-30; 1763, C. Q. 54.)

It was Mr. Kittson's plain duty, and he must have known it, when he was asking Mr. Smith—his old friend—to embark in this enterprise of acquiring these railroads by purchase at foreclosure sales, that they were liable to shipwreck even at the end of the voyage and after reaching port. That after acquiring the property they were liable to lose their purchase, because plaintiff was a secret partner.

And in any case, according to plaintiff, Mr. Kittson merely wished it kept secret from the stockholding interest—from "Litchfield, Becker and Bigelow, fighting for the possession of the property." There was no reason whatever for practicing deception on Mr. Smith or Mr. Stephen, and there was every reason against it.

And how came it that Mr. Newel "never heard Mr. Farley's name mentioned in that connection?" He was on terms of the closest intimacy with Mr. Hill. He and his firm of Young & Newel were Mr. Hill's advisers throughout, and took a principal part in the legal proceedings after the bonds were bought. If plaintiff had been interested, Mr. Newel could hardly have failed to have heard some mention of it.

And Mr. Galusha—why was he left in ignorance?

Mr. Hill and Mr. Galusha both testify that in Mr. Kittson's absence Mr. Galusha acted for him, not merely in carrying out what had been previously agreed on, but in deciding on what should be done, in consultation with Mr. Hill, using his own judgment. Mr. Galusha had long been Mr. Kittson's legal adviser and intimate friend. (Hill, 626, Q. 352; Galusha, 1047, Q. 28-29; 1048, Q. 37.)

Mr. Kittson was absent from St. Paul from about the middle of July until about the 1st of September, 1877. (Hill, 607, Q. 234-8). On August 1st, he telegraphed from New York, and on August 28th from Boston. (Defts.' Ex. 9, 10, p. 912.) The letter to Carp of July 31, 1877, was framed by Mr. Hill and Galusha, without consulting plaintiff, and was sent to Mr. Kittson at Watch Hill for his signature, and was there posted by him, on August 9th. (Hill, 607, Q. 232-4; Galusha, 1047, Q. 30, 31. And see Carp's memorandum on the letter, p. 534.)

Mr. Kittson was again absent at New Orleans and elsewhere in the south, from about the 24th of January until the 16th of March, 1878, during the negotiations following the offer made early in January, and until after the execution of the final agreement of March 13, 1878, with the Dutch committee. (Hill, 623-4, Q. 332-340; Galusha, 1050, Q. 44. Defts.' Ex. 17-19, pp. 918-9; Ex. 20, p. 919; Ex. 21, p. 921; Ex. 123-5, pp. 1301-3.)

During this period Mr. Hill had conferences in St. Paul with Messrs. Smith and Stephen, and communications with J. S. Kennedy & Co., with reference to the "ameliorations" of the offer desired by the committee, in all which Mr. Galusha acted for Mr. Kittson, and in regard to none of which was plaintiff consulted. (Hill, 624-5, Q 340-348; Galusha, 1049, Q. 43; 1051-2, Q. 56-7; Defts.' Ex. 17, Ex. 20, pp. 918-20; Ex. 96, 97, pp. 1020-3.)

And Mr. Galusha, as Mr. Kittson's representative, agreed on the terms of, and in his name executed, the agreement of March 13th, and all this without consulting plaintiff and in ignorance of his interest. (Galusha, 1050, Q. 45-8; 1051-2, Q. 53-7; Defts.' Ex. 122, being schedule A to answer, pp. 35, 44.)

If plaintiff was interested, Mr. Kittson would not have concealed it from Mr. Galusha. Besides the intimate professional and per-

sonal relations between them, Mr. Kittson would have had these two controlling reasons for fully informing him:

1. As the discretionary power delegated to Mr. Galusha by Mr. Kittson would be a power to act also for plaintiff, Mr. Kittson would certainly have informed Mr. Galusha of the fact, that the latter might know for whom he was assuming responsibility, and might consult his *cestui que trust*.

2. As Mr. Kittson considered plaintiff's judgment to be indispensable for the guidance of the enterprise, and as he would not himself act except on plaintiff's advice, he would most certainly have enjoined it upon Mr. Galusha, when acting for him, to resort to plaintiff for advice and to act on such advice; and when doing so, he could not have failed to tell Mr. Galusha of plaintiff's interest.

These considerations make these gentlemen's ignorance of plaintiff's interest proof of the most convincing character that such interest did not exist.

If it did exist, it is not possible that it should have been hidden from the sight of all men by a veil so heavy that plaintiff, with all the help he can obtain, is not able to lift even a corner of it.

THE CARP EPISODE. DECEMBER, 1876—FEBRUARY, 1877.

We have already mentioned the telegram to Mr. Barnes of August 16, 1876, Mr. Barnes' telegram in reply, in which he says he has written to Mr. Farley today, (Aug. 17th,) and plaintiff's letter to Mr. Barnes of Aug. 23d, in which he says "I Red your leter 17th to Friend Kitson," etc., and plaintiff's explanations of his own letter and his failure to produce the letter to himself from Mr. Barnes.

It will be noted that Mr. Barnes sends his reply to Mr. Kittson through Mr. Farley. In the following year, when negotiations with the Dutch committee were active, Messrs. Kennedy & Co. pursued this same course, using *their agent*, Mr. Farley, as a *channel for messages* to Messrs. Kittson and Hill.

Soon after this correspondence in August, 1876, a new face was put on affairs by the seizure of the First Div. lines by the trustees,

Oct. 9, 1876. The rescission of the Litchfield agreement removed the dangers to the enterprise from that quarter, and any urgent need of haste. At the same time the possession by the trustees would naturally tend to make the committee less desirous of selling, or inclined to ask a higher price. Whether the Litchfields would or would not allow the action of the trustees to go unchallenged, was a question having an important bearing on these matters. It would be natural, therefore, for Messrs. Smith, Kittson, and Hill to wait, as they did wait, until this question was settled before again approaching the Dutch committee.

No steps were taken by the Litchfields to oust the trustees, and in December, 1876, Mr. Carp came to St. Paul. Messrs. Kittson and Hill sought and obtained an introduction to him through plaintiff,—the natural though not the only means for making his acquaintance, (Hill, 811, C. Q. 680,) and renewed to him the question before put to Messrs. Kennedy & Co.,—will the committee sell their bonds, and at what price? (Hill, 593-4, Q. 150-4.) Mr. Carp could not answer this question; but in a letter of Feb'y 28, 1877, which cannot be found, (Hill, 602, Q. 198,) but is referred to in Messrs Kittson and Hill's letter of May 26th, 1877, he informed them of the amount of the then holding of the committee of each issue of bonds. And in their interviews he named prices which he thought would be acceptable to the committee.

Carp says (461) that plaintiff was only "present for a while at the first interview"—not at the others. He was a mere introducer of intending buyers to the agent of his own employers. Notwithstanding plaintiff's testimony as to the assurances he gave Carp of Messrs. Kittson and Hill's ability to raise the money, which, he says, alone induced Mr. Carp to listen to them, and which he places among the great and indispensable services he rendered to the enterprise, (1417-8 Q. 296-7) "Mr. Carp seemed to be somewhat incredulous as to our ability to raise money enough to buy the bonds," (Hill 593, Q. 154,) and this is confirmed by Mr. Barnes' letter of Feb. 6, 1877, to plaintiff (Plff.'s Ex. 115, p. 277,) already referred to, and which probably gives a more accurate report of Mr. Carp's state of mind than does the latter's deposition in behalf of his friend, given in December, 1887, after a lapse of

11 years. By that letter, also, it appears that they did not get so far as to disclose to Mr. Carp the name of Mr. Smith, but merely said that "some Canadian gentlemen stood behind them," for they found that Mr. Carp had what he called a "sheme" of his own, entirely at variance with the views of Mr. Smith. (Hill, 593, Q. 154.)

Mr. Carp advised a proposition on the basis of his own project, and one was accordingly made by a letter of Jan 29, 1877, addressed to him at New York, which is Exhibit E to Carp's deposition. (529.)

Whatever else may be said of this letter, it is very evident that the purchase proposed by it was not within the scope of plaintiff's alleged agreement or of the enterprise in which Messrs. Kittson and Hill were engaged with Mr. Smith. It was not an offer to buy any *bonds*, nor did it embrace a purchase of the St. Vincent extension, which was always a *sine qua non* with Mr. Smith. It was an offer to buy the First Division lines, without the land grant, at the price of $3,500,000, to be paid after the foreclosures were completed, and the bondholders could make a perfect title free of all incumbrances.

This letter was framed in concert with Mr. Galusha, who was not aware of the fact that plaintiff had any connection with it. (Galusha, 1045-6, Q. 20-24.) Plaintiff, however, testifies that he was consulted in the preparation of this letter, and claims this as one of his services under the agreement. (1430-1, C. Q. 9.) But in view of the statements in the letter as to the trifling value of the Extension lines, and plaintiff's testimony as to what he then considered those lines and their land grant to be worth, if he did take the part he claims, he practised a gross deception on his *cestuis que trustent*. (Farley, 1429-1430, C. Q. 8; 1441-8, R. Q. 1-25.)

The proposition not being in accord with Mr. Smith's views, his name was not mentioned in it, nor was it made known to him. (Hill, 812-3, C. Q. 688; 815, C. Q. 702; Smith, 1188-9, C. Q. 216-8.) And yet plaintiff's counsel made it a point against Mr. Smith that he could not state (1187, C. Q. 205-8,) the date or the substance of the proposition.

So far as appears, this proposition never reached the committee.

(Hill, 595, Q. 163-4.) As Mr. Hill says, it was made merely to humor Mr. Carp, and pave the way to future negotiations on a different basis, and in accordance with Mr. Smith's scheme. It needs not Mr. Hill's testimony, (825-7, R. Q. 4,) to show how safe and how futile was that offer. Plaintiff has testified (1450, R. Q. 37) that in January, 1877, he thought the 207 miles of the Main line alone to be then worth $20,000 per mile, or $4,140,000. Besides this the offer covered the 76 miles of the Branch line, including the very valuable 10 miles between St Paul and Minneapolis and the invaluable terminals at St. Paul—a property, too, certain to enhance greatly in value with the settlement of the new country it traversed. For these two lines the price offered was $3,500,000, payable, *without interest*, after that distant date when the bondholders should have acquired title under foreclosures. It was only by purchase of the Litchfield stock for $500,000 that foreclosure decrees were reached in 1879. And payment did not have to be made even then, nor until a conveyance free from incumbrances. On the Branch line was a first mortgage for $120,000, not due till 1881, and there were outstanding $366,000 of bonds secured by a second mortgage and not due until 1892; both these mortgages being prior to any others, and no default having been or capable of being made. (See Stipulation, Defts.' Ex. 167, p. 1587.) To make an unincumbered title the committee must pay off these mortgages, which they could not do, without the bondholders' consent, till 1892. It was, indeed, a safe offer, even in the remote contingency of its acceptance.

But by this proposition and the conferences resulting from it Messrs. Kittson and Hill obtained from Mr. Carp an expression of his own opinion as to the prices the committee would probably exact, should they be willing to recommend a sale at all. (Hill, 595, Q. 165; Smith, 1140-1, Q. 75-6; Stephen, 1230, Q. 35.)

In the circuit court it was argued that the part played by plaintiff in introducing Messrs. Kittson and Hill to Carp, and on other occasions as a medium of communication, is evidence that he was an associate with them. The same reasoning makes associates also of Barnes and Carp, who, like him, were employes of

the committee, and through whom communications for the committee were sent.

THE MEETING AT MONTREAL IN MAY, 1877.

See the following testimony:

Hill, 595-600, Q. 166-190; 810-1, C. Q. 676-679; 813-4, C. Q. 690-9.

Smith, 1139-1143, Q. 70-82; 1180, C. Q. 158-160; 1213-5, R. Q. 7-13.

Stephen 1229-1233, Q. 25-48.

Defts.' Ex. 119, p. 1271.

After the meeting at Ottawa in March, 1876, Mr. Smith did not relax his efforts to interest Mr. Stephen in his scheme, and at length the latter became so far a convert to his friend's views that in May, 1877, *Mr. Smith requested* Messrs. Kittson and Hill to come to Montreal. (Smith, 1139, Q. 71; Stephen, 1229, Q. 26.) And the fact that the meeting was called by *Mr. Smith* is conclusive against a supposition made by counsel that the visit "was probably brought about" by a suggestion from plaintiff, who, moreover does not even swear that he made any suggestion. And so it is conclusive against the argument that the meeting was somehow a result of the letter of Jan. 29, 1877, to Carp, of which letter Mr. Smith knew nothing, as has just been pointed out.

In response to this request, Mr. Kittson left for Montreal, followed on the next train by Mr. Hill, who found him sick in Chicago, and unable to proceed further, so that Mr. Hill went to Montreal alone. (Hill, 595-6, Q. 166; 810, C. Q. 677-9.)

At Montreal Mr. Hill for the first time met Mr. Stephen, and then first learned that Mr. Stephen was president of the Bank of Montreal, and that Mr. Smith desired to interest him in the enterprise. (Hill, 596-7, Q. 167-174; Smith, 1140, Q. 72-73; Stephen, 1229, Q. 25.)

Mr. Stephen thinks this interview was in March, (1229, Q. 27,) having a "hazy recollection that there was snow on the ground," (Q. 38.) His error is of course immaterial. That the meeting was in May is conclusively shown by the telegram of May 21st, (533) sent by Mr. Hill in Mr. Kittson's name to Carp.

At the March, 1876, meeting at Ottawa, it had been agreed that Messrs. Kittson and Hill should ascertain from the Dutch committee whether they would sell their bonds and at what price. Meantime they had learned Mr. Carp's views as to what price would probably be acceptable to the committee, should they desire to sell at all. At this May, 1877, meeting, with Messrs. Smith and Stephen, Mr. Hill was fully supplied with documentary and other information, (including railroad commissioners' reports,) and prices for the bonds were arrived at, based in part on the value of the properties and in part on those which had been communicated by Mr. Carp. And it was determined that Mr. Kittson and Mr. Hill should ascertain from the committee whether they would recommend a sale at these prices, but it was not definitely determined to *offer* those or any prices. (Hill, 598-9, Q. 180-1; Smith, 1140-1, Q. 76-7; 1181, C. Q. 161; 1183, C. Q. 177; 1213-5, R. Q. 7-13; Stephen, 1230-1, Q. 29-36; 1232-3, Q. 43-8.)

Although the ensuing letter of May 26th, is often spoken of as an "offer" or a "proposition"—as, indeed, the committee considered it.

At this meeting (which occupied two or three days) it was also concluded that Mr. Hill, who knew Mr. Litchfield, should interview him on the subject of the First Div. Co. stock. Mr. Hill accordingly went to New York, and did so. (Hill, 599-600, Q. 185-9.)

Before leaving Montreal, Mr. Hill sent to Mr. Carp the telegram of May 21, 1877, which is Exhibit E to the latter's deposition, signing it "N. W. Kittson." (533.)

The Letter of May 26, 1877, and the Negotiations that Followed it.

Arrived home, Mr. Hill, together with Mr. Kittson, proceeded to carry out the programme arranged at Montreal.

While Messrs. Stephen and Smith, having made no arrangements for procuring the money, were not prepared to make a binding offer for the bonds, (and hence there could be no absolute engagement between them to buy the bonds, and of course Messrs. Kittson and Hill were in no position to make an offer,) still it was not likely that

the committee would consider anything that was not an offer. It was therefore deemed necessary by Messrs. Kittson and Hill to frame a letter which should read like an offer, but should be really a mere request for an option. This was done, and the letter of May 26th was prepared with the aid of Mr. Galusha and Mr. Young, but without consultation with plaintiff. It will be noticed that Mr. Hill calls this letter a "proposition," though he fully explains its character. (Hill, 600-2, Q. 191-200; 815, C. Q. 700-1; Galusha, 1046-7, Q 26-7.)

When Mr. Hill went to Montreal and when the letter was framed and sent, plaintiff was in New York, conferring with J. S. Kennedy & Co. about the "cut-off" project, which had been revived by them early in 1877, and forms the staple of their correspondence from that time till the cut-off was completed in September. (Farley, 96, Q. 222-4; Plff.'s Ex. 124, p. 285.) And see Plff.'s Ex. 127, p. 286, which also relates to the "cut-off," and shows that plaintiff at this time was scheming to interest Messrs. Kittson and Hill in the cut-off, but they would not undertake it. And the letter of Kennedy & Co. of May 22, 1877, (Plff.'s Ex. 125, p. 285,) also relates *solely* to the cut-off. (Kennedy, 1611-2, C. Q. 29; 1641-2, R. Q. 10.)

The original letter of Messrs. Kittson and Hill to Mr. Carp of May 26th, is part of Exhibit E to Carp's deposition. (533.)

A copy of it was sent at once to Mr. Stephen, and with figures, etc., pencilled on it by him, is Defts.' Ex. 119. The copy of this as printed in the Record (1271) errs in applying the words "Branch Line" to all the issues of bonds, and does not show the pencillings. (Smith, 1141, Q. 77; 1214-5, R. Q. 9-12; Stephen, 1230, Q. 32-3.)

The letter is not and was not meant to be a model of clear expression. But it served its purpose, and was the basis of subsequent negotiations. An "offer" with which "the president of the Bank of Montreal," and the "chief commissioner of the Hudson's Bay Company" appeared to be connected, at once commanded the attention of Mr. Carp and the committee—therein differing from that of Jan. 29, 1877, which, though backed by Mr. Farley's assurances, Carp seems to have consigned to the waste basket,—he certainly never laid it before the committee.

At the same time, it will be observed that in this letter Messrs. Kittson and Hill are careful not even to appear to commit any one but themselves. They had no authority to do so. And Messrs. Smith and Stephen always maintained (as the former does in his testimony) that they were in no way bound by this letter. The committee, it is true, hastily assumed that Messrs. Smith and Stephen, by reason of the letter and their subsequent action, were bound by the "offer" in the letter.

On receipt of the letter, (about the middle of June,) Lippmann, Rosenthal & Co., the most prominent members of the committee, taking it for an offer to buy the bonds, notified Messrs. Kennedy & Co. by cable, on June 22d, that they had received a proposal. (Kennedy, 1613-5, C. Q. 35-41.)

Soon after the receipt of this message by J. S. Kennedy & Co., Mr. Hill, being in New York, called on them and discussed the matter with them. (Hill, 604-5, Q. 209-216.)

Messrs. Kennedy & Co advised plaintiff of the "proposition" made to the committee, and *of Mr. Hill's visit*, and of their own opinion, in a letter of June 27th, which is Plff.'s Ex. 132, p. 289, saying:

"We mention these matters so that you may know our general views, if Mr. Hill speaks of this on his return; but it is very important that the whole matter should be regarded as confidential, and that the fact that any such idea was entertained should not be known to any one but yourself and Mr. Hill and Mr. Kittson." (290.)

How much plaintiff really knew of the plans of Messrs. Hill and Kittson at this time is indicated by his letter of June 8, 1877, to Mr. Barnes, inclosing a newspaper report of the meeting for organization of the Western R. R. Co., to build the Brainerd branch, with Mr. Becker as president and Mr. Kittson as vice-president, to which plaintiff calls attention, and adds: "The universal impression prevails here that the Brainerd branch will be speedily built. This accounts for the lukewarmness of our friends in Minnesota about building the Breckenridge cu -off." (Defts.' Ex. 81, p. 1013. And see Ex. 82, p. 1014.)

Messrs. Kittson and Hill and their friends had two very good and

very obvious reasons at that time for letting the cut-off alone. 1. Their friends would need all the money they could raise to pay for the bonds. 2. It would be folly to spend money in a scheme that would necessarily enhance the price of the bonds they were trying to buy.

Plaintiff, in those letters, shows that he thought Messrs Kittson and Hill were allying themselves with the enemy—a course foreign to their intentions and inconsistent with their purposes, as he would have known if he had been aware of the letter of May 26th.

Plaintiff's letters of June 14th and July 18th (Defts.' Ex. 83, p. 1015; Ex. 85, p. 1016,) show that he did not think these properties a very desirable acquisition at that time.

Plaintiff's reply to Kennedy & Co.'s letter informing him of the proposal of Messrs. Kittson and Hill, is dated June 30, 1877, and is Defts.' Ex. 84, p. 1015.

The letter of May 26th was followed by correspondence with Carp. A copy of his letter of July 11th, is Defts.' Ex. 8, p. 911, and Messrs. Kittson and Hill's telegrams and letters to him in July are in Exhibit E to his deposition. (534-7.)

The letter of July 11th shows the importance attached by him to the names of Messrs. Smith and Stephen.

During this period Messrs. J. S. Kennedy & Co. were active in organizing the Red River & Manitoba R. R. Co., to build the cut-off with funds to be furnished by the Dutch. Messrs. Kennedy & Co. repeatedly expressed to plaintiff their wish that he should make Messrs. Kittson and Hill incorporators, and express their regret that plaintiff, for some reason he does not disclose, did not insert their names in the articles. (Plff.'s Ex. 135, p. 292; Ex. 139-141, pp. 297, 298, 299.)

On June 16th "our young Dutchman Knupp" started for Holland to marry Carp's wife's sister. (Defts.' Ex. 83, p. 1015;) and while there he doubtless learned much about the pending negotiations, and Mr. Carp's views. On July 30, Mr. Carp writes to plaintiff: "I have had much conversation with Knuppe about St. P. & P. matters, *and refer to him for verbal* communications." (Plff.'s Ex. 136, p. 295.)

Knuppe arrived in New York Aug. 21, 1877, and there got Ken-

nedy & Co.'s views, and they so write plaintiff on that day. (Plff.'s Ex. 143, p. 301.) On his reaching St. Paul, the plaintiff doubtless got these "verbal communications," and from these and Kennedy & Co.'s letter of Aug. 21, (Plff.'s Ex. 143, p. 302,) and their telegram of the same date, (Plff.'s Ex. 173-4, p, 323,) he learned that the committee were likely to agree to a sale and desired an extension of time.

He at once proceeded to carry out the idea he had entertained from the start, from the time he wrote Mr. Barnes on June 3, 1876, about the "big thing in 3 and 6 milion bonds," and on August 23, 1876, that its becoming a "Canady" project would be "a mater of no moment to you or me, if we could make some money." He proceeded to buy bonds and certificates, on joint account with one Day, of Dubuque. This fact was brought out on his cross-examination. (169-176; C. Q. 297-355.)

These transactions of plaintiff will be treated under a separate head. His correspondence with Kennedy & Co., through whom he sold the bonds to the associates in the summer of 1878, appears in Table II. hereto prefixed.

Mr. Farley's Letters.

We here present some of these letters about his bond purchases, with certain other letters of plaintiff to J. S. Kennedy & Co. and its members, no one of which could have been written by a person associated with Messrs. Kittson and Hill.

The letter of May 26th named 80 per cent. for the bonds of the $1,200,000 issue Branch line, and 40 per cent. for the $6,000,000 issue, Main line. (533.)

On Sepr. 24, 1877, Messrs. Kennedy & Co. wrote to plaintiff (Plff.'s Ex. 149, p. 305) that at a conference between Mr. Barnes and the associates at Montreal the price for the $6,000,000 issue was raised to 42½ per cent., but the committee now wish the price for the $1,200,000 issue changed from 80 per cent. to 75 per cent., and of the $6,000,000 reduced to 35 per cent.

On Sepr. 21st, they wired plaintiff inquiring if either Mr. Kittson or Mr. Hill had returned to St. Paul, (Plff.'s Ex. 192, p. 327,) and

on Monday, Sepr. 24th, plaintiff wired them: "J. Hill has returned to St. Paul. Mr. K. will be here the latter part of this week." (Defts.' Ex. 89, p. 1017.)

On Wednesday, Sepr. 26, *after Mr. Hill's return from Montreal*, plaintiff wrote to J. S. Kennedy & Co.:

"*I know nothing* about the progress being made to change ownership and control of the property out here." (Defts.' Ex. 90, p. 1017.)

On Sept. 27th, Mr. Farley wrote the following autograph "confidential" letter to Mr. Barnes:

"This mater of Kitson & Hill is somewhat mudled. J. Carp seems to refer to Knupp many things which they suposed they had to arrange with you.

"Knupp has made a demand on them for 25,000$ as a bonus for his coming out here and liable to be thrown out of employment if they trade with the Duch. Hill takes the thing as a joke. Kitson is indignant.

"Knupp is terrible uneasey It is well for you to know these things, but do not mention my having sayed anything." (Defts.' Ex. 91, p. 1018.)

On Oct. 23, 1877, when it was supposed that a cash purchase of a majority of the committee's holding had been effected, with the changes in prices stated just above, plaintiff wrote in an autograph letter to J. S. Kennedy & Co.:

"I hold Comittys Certificates for 25,250$, 1,200,000 Branch Loan bonds, which I authorized Knupp to say to Mr. Carp might go in with sale, but at that time I understood the offer to buy this Class Bonds to be 80 cents. *They* have reduced the price to 75—and *I learn* they advertise to take up cirtificates at a still less price. I hold 17,000$, 6,000,000 Loan Bonds—would be glad to accept 40 cts., but not 32 cts." (Defts.' Ex. 61, pp. 1003-4.)

Early in January, 1878, at New York, after failure of the project of a *cash* purchase, the associates made a binding proposition to buy the bonds *on credit*. Messrs. Kittson and Hill returned to St. Paul, the former remaining here until about Jan. 24th, when he left for the South, and Mr. Hill remaining in St. Paul until the adjournment of the legislature early in March. Mr. Stephen and Mr. Smith visited St. Paul about Feb. 1st. As showing Mr. Hill's presence in St. Paul

during all this period, see (among others) Defts.' Ex. 11, 12, p. 912-3; Ex. 17, 18, 20, pp. 918-9; Ex. 96-99, pp. 1020-3; Ex. 123, 124, pp. 1301-2.

On Feb. 9th Mr. Farley left St. Paul for Dubuque, returning on the 14th. (Defts.' Ex. 148, p. 1498.) In his absence a St. Paul newspaper, on Feb. 12th, announced that the sale was concluded. (1462.) On his return to St. Paul, plaintiff sees this announcement, and then, *although Mr. Hill was in St. Paul*, he writes J. S. Kennedy & Co. as follows, in an autograph letter, dated Feb. 15, 1878:

"Would it be asking to much of you to give me a short condenced statement of the contract Between the Dutch Bondholders and Hill, Kitson & Co. How many of each kind of Bonds do our Friends get, price of each, and *how* and *when* do they pay?" (Defts.' Ex. 71, p. 1009.)

On the 19th Messrs. Kennedy & Co. answer, in a letter (written by Barnes—958, Q. 19.) headed "confidential," giving the desired information, and adding: "As Mr. Hill has not given you the details of this offer, please regard the above as strictly confidential." (Defts.' Ex. 46, p. 993.)

On Feby. 22, 1878, plaintiff, in an autograph, "private" letter, acknowledges the receipt of the above letter, and writes as follows:

"I have your confidential favour 18th for which I am under many obligations. I would be pleased to have your understanding of the contract as to the Number of Bonds of each Isue Mess. Hill & Kitsen and their associates are under obligation to take under the arrangement. You will understand the Drift of my Inquiries. It has been more than intimated to me that Mess. H & K would be pleased to make me interested in their Shares of what may result from this trade, in order to have me help them work the mater through in Minnesota, care for the property, &c. My judgment is some of these Bond is Cheap at the price named, and others very much higher than I would pay. Yours, etc. J. P. FARLEY."

"Please excuse me for troubling you my private maters, but harm shall result."

On Feb. 25th, Mr. Kennedy sent a hurried reply to this, merely saying:

"We think it will pay you to take an interest with K. & H., and we are glad to hear that they have offered it to you. The purchase

has now been concluded; we have so advised the committee at Amsterdam by cable today, and it will be publicly announced there tomorrow morning." (Plff.'s Ex. 162, p. 317.)

On Feby. 27th, Messrs. Kennedy & Co. answer in detail Mr. Farley's inquiries in his letter of the 22d. (Defts. Ex. 47, p. 994.) This letter was written by *Barnes*, (Nichols, 958-9, Q. 20-1,) which accounts for Mr. Kennedy's ignorance of it. (1627, C. Q. 85.)

Having received the information plaintiff writes an autograph "confidential," letter as follows to Mr. Barnes, on March 9th:

"During the summer past I bought on Joint account with One of my Dubuque friends 25,250$ Comittys certificates of the Branch Line 1,200,000 Loan, and 17,000$ Main Line 6,000,000 Loan. When my friend understood H & K offer to be 80 cts & 40 cts, we decided to put in the Branch Interest with the Duchman at 80 cts, understanding it would require about 3 c. of the proceeds to pay expenses of the Comitty. This proposition now comes up in a different shape, and my friend is undecided as to what is best to do. If we could get the Bonds out of the hands of the Comity by paying even 5c, they could be sold here for 80 or 85 cts. I am willing my part of them should go in with the Dutch Interest. What would you advise in the matter?" (Deft'. Ex. 62. p. 1004.)

On May 23, 1879, the associates, having purchased the Branch line at a decretal sale, organized the Manitoba Co., whereupon plaintiff wrote the following autograph letter to Mr. Barnes, which is found in Mr. Kennedy's deposition for defendants in the Sahlgard and Stricker Cases, which deposition is Plff.'s Ex. 245, in this cause. (1739, 1751.)

"John S. Barnes, Esq:

"Since the election of Bigelow & Galusha as Directors in the New Company, Men of no Money, railroad experience or Influences, And myself left out in the *cold*, I am forced to the conclusion that My time and claims on the St. Paul & Pacific is Short, I did expect better things of Hill & Kittson. I had a talk with Jim Hill last knight. He disclaims any intention on his part to ignore my Claims. But he is such a Lyer can't believe him. It is a matter of astonishment to every Person in St. Paul to see the way Jim handles Mr. Stephens. He is notoriously known to be tha bigest lier in the State.

"Mr. Kittson has told me time and again that Jim Hill was the worst man he ever saw. Upham, P. H. Kelly, Thompson, *and in fact* every citizen in St. Paul if they would Speak their Sentiments

would all tell the same story. You Must Not blame Me if I should try to get even with Jim Hill before I leave here. Yours, &c

"J. P. FARLEY."

On May 29, 1879, the plaintiff wrote the following letter to Mr. Kennedy, then on his way to St. Paul, who received it upon his arrival. (Kennedy, pp. 1603-4, Q. 14.)

"St. Paul May 29th 1879

"J. S. Kennedy Esqr.

"Your letter 26th reached me this morning fortunate we had just made arrangements to send the Car to Chicago with Mr. Smith and Lord Elveston. I hope it will reach there in time for you and your party. Pressing business compells to be absent a few days. I have had some sharp talk with Mr. Hill. If he persists in his present course to Ignore all my claims to Share in the *honors* or *profit* to some small degree, He may have cause to Regret it, I hope to be back early next week. Yours, &c

"J. P. FARLEY"

(Defts. Ex. 141, p. 1492.)

Of these two last letters the first is to a man with whom Mr. Farley used to exchange confidential letters about making money out of bond speculations even though Mr. Kittson's scheme "might become a Canady Project." The last letter is written to the man to whom "I looked largely to see me righted in this matter." (1399, Q. 215.) In neither letters does he hint at a contract, or at any *rights*, under contract or otherwise. In both his grievance is that his "claims" are "ignored"—just as a politician might complain on failing to get an office to which he had "claims," but no promise of it. And to the man "to whom I looked to see me righted," Mr. Farley states just what he thinks he has "claims" to —viz.: "to share in the honors or profit *to some small degree*."

We submit that the foregoing letters of themselves are conclusive against plaintiff's claim. Not one of them could have been written by an associate with Messrs. Kittson and Hill.

THE TRANSACTIONS IN THE AUTUMN OF 1877, AND HEREIN OF THE CIPHER MESSAGES FROM J. S. KENNEDY & CO.

To the parol testimony of himself and Fisher, the plaintiff adds a large number of letters and telegrams of J. S. Kennedy & Co.,

in 1877-8, to himself as their and the bondholders' representative, in which they both kept him informed to some extent of what was going on, and also used him as a medium to convey to Messrs. Kittson and Hill their wishes and those of the committee.

These letters and telegrams contain no mention or recognition of any agreement; they show that they were sent to him as Kennedy & Co.'s and the bondholders' representative, and they show from what source he derived such familiarity with the negotiations as he was able to exhibit in his testimony.

The first letter of Kennedy & Co. has been already mentioned—that of June 27, 1877, (Plff.'s Ex. 132, p. 289) in which they told him of their interview with Mr. Hill and their own views of the "proposal."

From Mr. Hill's telegram of July 31st and the letter of the same date to Mr. Carp, (in answer to his letter of July 11th, Defts.' Ex. 8, p. 911,) it appears that Messrs. Kittson and Hill gave the committee until Sept. 10th in which to act on the letter of May 26th. (Carp's Deposition, Ex. E, pp. 534-5.)

The Dutch committee wished modifications of the prices, etc., named in the letter of May 26th, and (on account of the shortness of the time given them—until Sept. 10th—and doubtless for other reasons) desired Messrs. Kennedy & Co. to have a personal conference with Messrs. Kittson, Hill, Smith and Stephen. Accordingly, on Aug. 21st, J. S. Kennedy & Co. send plaintiff a message in cipher, requesting him to communicate the committee's wishes to Messrs. Kittson & Hill. This message and a translation are Plff.'s Ex. 173-4, p. 323.

On May 28, 1877, (before they knew anything of the letter of May 26th,) Kennedy & Co. had sent plaintiff a copy of their private cipher code for use in telegraphing, the building of the cut-off with funds raised in Holland requiring frequent communication. (Plff.'s Ex. 126, p. 285.)

The messages in evidence are made up of ordinary and cipher words, the latter being arbitrary and representing sometimes a proper name, or a single word, or several words or an entire sentence. Hence the use of the Code made a great saving of expense and insured entire secrecy.

Even if the Code had not been used, the same reasons which induced the committee to request J. S. Kennedy & Co. to have a personal interview with the associates would lead J. S. Kennedy & Co. to communicate that request through plaintiff. Time would thus be saved. Besides, it might well be that Messrs Kittson and Hill might be (as they were) absent from St. Paul, while plaintiff was paid $20,000 a year to be there. Thus Plff.'s Ex. 192, p. 327, is an inquiry as to whether Mr. Kittson or Mr. Hill is in St. Paul.

Of course, plaintiff, by his introduction of the messages, claims that they in some way show his interest, and in his testimony he falsely says (157-8, C. Q. 205, 207,) that they were sent to him at Mr. Hill's request made to J. S. Kennedy & Co. But this is directly contradicted by Mr. Hill (608-9, Q. 243-8,) and by Mr. Kennedy, (1592-3, Q. 4-7,) and by the tenor of the writings themselves. Plaintiff says (156-7, C. Q. 202-3,) that if he had not been interested, he would not have "bothered" himself about the business at all. But he has himself shown that on former occasions he was "bothered" in the same way, and received and executed directions from Messrs. Kennedy & Co., to find out whether small lots of bonds held by their customers could be sold in St. Paul and at what price. He shows this by his own letters embodied in questions put to Mr. Upham on cross-examination. (1110-1, C. Q. 212-214.)

Mr. Kennedy states in his deposition why these cipher messages were sent to plaintiff. (1593 Q. 5, 7,) viz., to insure privacy, and because he was "the confidential agent of myself and the bondholders."

After the offer made in New York, in January, 1878, Kennedy & Co. furnished Mr. Hill and Mr. Stephen each with a copy of their cipher code. From that time forward plaintiff is not able to produce a cipher message (or any other) relating to the negotiations or the enterprise. And Mr. Hill and Mr. Kittson testify, and the telegrams themselves show, that from that time plaintiff was not used by Kennedy & Co. as a channel of communication with Messrs. Kittson and Hill. (Hill, 610-1, Q. 253-5; Kennedy, 1593, R. Q. 6, 7; Defts.' Ex. 11, 12, p. 912-3; Ex. 98-101, pp. 1023-4.)

On the same date (August 21, 1877,) with the first cipher telegram, Kennedy & Co. also wrote plaintiff, advising him that it had

been sent, telling him that Knuppe had that day arrived from Holland, and that "Mr. Knuppe can give you all the information we have on this subject"—of the negotiations for the bonds. (Plff.'s Ex. 143, p. 302.)

As Mr. Carp had had "much conversation with Knuppe about St. P. & P. matters," and refers plaintiff to him "for verbal communications," (Plff.'s Ex. 136, p. 295,) it would be strange if plaintiff had not learned a good deal of what was going on. And this letter of August 21st, and that from Carp, and later letters from Kennedy & Co., show that if plaintiff was interested with Kittson and Hill, he was playing the part of a spy in the counsels of the bondholders.

Plaintiff, not understanding the first message, that of Aug 21st, (Plff.'s Ex. 173-4, p. 323,) wires that the Code does not give the cipher words used. (Defts.' Ex. 86, p. 1016.) On the next day, (Aug. 22d,) he gets an explanatory message, (Plff.'s Ex. 175, p. 324,) and at once communicates to Mr. Hill the request for a meeting between the associates and J. S. Kennedy & Co. (Farley, 98-9, Q. 237; Hill, 608, Q. 241-2.)

On the next day, (Aug. 23d,) Mr. Hill wrote to Mr. Stephen a letter which shows very plainly in what capacity he supposed Mr. Farley to be acting. He says:

"Yesterday Messrs. Kennedy & Co., the N. Y. agents of the Dutch bondholders, telegraphed *their agent here* to request a conference with yourself, Mr. Smith, and ourselves, which was made known to me last evening. This morning I telegraphed you that I expected to meet you in Montreal early next week. Mr. Kittson has not yet returned," etc. (Defts.' Ex. 121, p. 1300; Stephen, 1233, Q. 49, 50.)

Mr. Hill says *not* "our associate, Mr. Farley," nor even "Mr. Farley," but "*their agent here.*"

At the meeting at Montreal, in May, 1877, it was understood that the matter of obtaining the funds necessary to a purchase should be managed by Mr. Stephen, who then intended to visit England in the ensuing autumn, and was confident that he could get the money there. (Hill, 597-8, Q. 175-179; Stephen, 1231-2, Q. 39-41.)

And here may be noted the falsity of the story that Mr. Hill and

Mr. Kittson said, at the time of making the pretended agreement, that Messrs. Smith and Stephen would obtain the funds needed to buy the committee's holding *through the Bank of Montreal.* (*Supra*, p. 50, 51, 57.)

It is proved beyond question that never at any time was such a purpose entertained by Mr. Smith or Mr. Stephen, or mentioned by either of them to Mr. Kittson or Mr. Hill. On the contrary Mr. Smith had mentioned the sources in London to which he had expected to apply for money. (Hill, 503, Q. 107; 602-3, Q. 201-3; 696, Q. 629; Smith, 1138-9, Q. 64-67; 1223-4, R. Q. 33-4; Stephen, 1244, Q. 115.)

After the associates arranged for a purchase of the committee's bonds on credit, they did borrow of the bank, on pledge of collaterals, the much smaller sums needed to pay the Dutch committee's expenses, to pay interest on the purchase money, and to buy outstanding bonds, but this was a very different thing from getting the millions needed for a cash purchase of the committee's holding. The loans in fact effected, as to which there was no secrecy, doubtless led plaintiff to think that in the original plan the associates expected to borrow the purchase money from the bank, and so suggested the invention of the statements attributed to Messrs. Kittson and Hill.

As Mr. Stephen was to undertake the raising of the money on his intended visit to England, it was of course desirable that he should first see the property he was going to recommend to capitalists. And Mr. Smith was very desirous he should do so, that he might share Mr. Smith's own enthusiasm as to the country. (Smith, 1179-1181, C. Q. 157, 165; Stephen, 1233, Q. 52.)

Accordingly, at the end of August, 1877, Mr. Smith being in Manitoba, and Mr. Stephen at Chicago, on bank business, it was arranged that they should meet in St. Paul and take a trip over part of the lines. They met in St. Paul on Saturday, the 1st of September, and on the next day, Sunday, the four associates, with Mr. Angus and Mr. Farley, went over a part of the Main line in the pay car.

Plaintiff and Fisher testify at length as to this trip, as if it in some way showed that the former was interested, or was, as an

associate, rendering aid to the enterprise. But plaintiff knew that his employers had under advisement a sale of the bonds to the associates, and wished to make it, but at higher prices than those named. And as the agent for the committee it was the natural and proper thing for him to do to furnish them such facilities for examining the property as they might desire. Plaintiff's and Fisher's statements as to what occurred on this trip, while they amount to nothing as an aid to plaintiff's case, do not accord with the recollections of Mr. Hill, Sir Donald Smith, and Sir George Stephen. (Farley, 99, Q. 240; Fisher, 350, Q. 106; Hill, 697, Q. 634; Smith, 1181-3, C. Q. 166-174; Stephen, 1234-5, Q. 57-61.)

On August 30th and on Sept 3rd, J. S. Kennedy & Co. sent the cipher messages which are Plff.'s Ex. 180 and 182, and translations of which are Ex. 181 and 183, on pages 324-5. They ask plaintiff to tell Messrs. Kittson and Hill of their desire to meet the four associates, in season to inform the committee of the result before the 10th, and, if that is not practicable, to get the time given the committee extended.

On September 5th and 6th they wire again about the meeting. (Plff.'s Ex. 184, 189, pp. 325, 326.)

On Sept. 6th they send plaintiff a letter (Plff.'s Ex. 147, p. 304,) stating the importance of a meeting before the 10th, etc. This letter is only important as giving plaintiff an opportunity, which he does not miss, of making a false statement. His attention is called by his counsel to this letter, and he says: "I communicated to him (Mr. Hill) the contents of this letter as soon as it was received and he could be found." (100, Q. 243.)

But this letter, dated the 6th, could not have reached St. Paul before the 9th—Sunday. Mr. Barnes' letter of Sept. 24th (Plff.'s Ex. 149, p. 305) says that the writer went with Messrs. Kittson and Hill from New York to Montreal "on the 11th inst.," so that Mr. Hill must have left St. Paul at least as early as the 8th. And plaintiff, in his own letter of Sepr. 8th, (Plff.'s Ex. 64, p. 234,) writes that Messrs. Kittson and Hill "left St. Paul with the expectation of arriving in New York Sunday," the 9th—*i. e.* they must have left by the 6th. And they had not returned on the 21st,

(Defts.' Ex. 88, p. 1017,) by which time the letter was obsolete, and there would be no possible occasion to show it to Mr. Hill.

At this meeting in Montreal, at the committee's request, a change in price for the $6,000,000 bonds from 40 to 42½ per cent. was acceded to by the associates, and Messrs. Kittson and Hill so notified the committee on Sepr. 14th, in a letter which is part of Ex. E to Carp's deposition. (537-8.)

The result of the meeting was communicated to plaintiff, *not by the associates*, but by Mr. Barnes, in the letter of Sept. 24th. (Plff.'s Ex. 149, p. 305.)

But before writing this letter, J. S. Kennedy & Co. learned that they had not been fully informed of the views of the committee, and that at the Montreal meeting they had succeeded is raising the price of bonds which the committee wished lowered, and that changes in the prices for other issues were also desired. This they recount in the letter, ask plaintiff to get from Messrs. Kittson and Hill a change of prices to meet the views of the committee, and say: "Upon receipt from them of a wire, saying: 'We authorize you to change figures in accordance with your letter to Farley of Sept. 24th,' we will cable it to Amsterdam" And they ask him to communicate the contents of the letter to them, "and obtain from them the telegram desired to us as soon as practicable." They add: "*We address this to you principally because we desire that you shall be fully informed in regard to this negotiation.*"

Plaintiff says (101, Q. 247:) "My recollection is that I made Mr. Hill perfectly acquainted," [with the request contained in the letter,] "and he and I agreed. Mr. Hill telegraphed these parties to answer the Dutch committee according to Mr. Barnes' request there."

But this letter of the 24th would reach St. Paul on the 27th. And it appears that instead of telegraphing to Kennedy & Co. to answer the Dutch committee, Mr. Hill telegraphed directly to Mr. Carp, of the committee, the telegram being part of Ex. E to his deposition. (539.)

These last two matters are important only as additional instances of invention substituted for recollection.

But before the letter of Sept. 24th to plaintiff was received by

him, and before Messrs. Kittson and Hill arrived home after the meeting at Montreal, J. S. Kennedy & Co. (having learned the real wishes of the committee) sent to plaintiff on Friday, the 21st, the telegram mentioned in the letter, (and which is Plff.'s Ex. 192, p. 327,) inquiring if either of them was in St. Paul, and received plaintiff's telegram in the negative, which is Deft.s' Ex. 88, p. 1017.

On the 24th, (Monday,) however, plaintiff telegraphs: "J. Hill has returned to St. Paul. Mr. K. will be here latter part this week." (Defts.' Ex. 89, p. 1017.)

On the 25th, J. S. Kennedy & Co. wire plaintiff: "Confer with Knuppe concerning Vigor's proposition"—"Vigor" meaning Messrs. Kittson and Hill. (Plff.'s Ex. 194, p. 327.)

And after receiving this, *and after Mr. Hill's return from Montreal, prior to the 24th*, plaintiff writes on the 26th (Wednesday:) "*I know nothing about the progress being made to change ownership and control of the property out here.*"

On Messrs. Kittson and Hill's return, Knuppe, *anticipating plaintiff*, seems to have presented "claims" that he thought he had, and which occasioned plaintiff's autograph letter of Sept. 27, 1877, already quoted at length. (*Supra*, p. 148.)

And a little later plaintiff's friend, Carp, put in a modest claim for "$200,000 common," to expedite matters; a claim he renewed the following spring, when it was treated just as Knuppe's smaller and plaintiff's larger demands have been treated. (Carp's Deposition, Ex. E, p. 539; Defts.' Ex. 100, 101, p. 1024.)

In a "private and confidential" letter of Oct. 2d, Messrs. Kennedy & Co, acknowledge plaintiff's letters of Sepr. 26th and 27th (Defts.' Ex. 90, 91, p. 1017-8,) express their views of Carp and Knuppe, and say that Messrs. Kittson and Hill, "if they will take advice given unasked," should have no more to say to them, but send all their communications to the committee directly or through J. S. Kennedy & Co. They then go on with a statement of the motives actuating the committee and the strait the committee is in, which they would never have written to one whom they did not consider entirely devoted to their own and the committee's interests— *cer-*

tainly not to one of a syndicate negotiating with the committee. And they very properly add:

"Please keep all this within our mutual confidence, *only* you can say to K. & H. that we have advised as is above stated in regard to Mr. Knuppe, Mr. Carp, & the manner of correspondence with the committee." (Plff.'s Ex. 154, p. 310.)

Towards the end of September, Mr. Stephen sailed for Europe, and there had personal negotiations with Mr. Carp, in London, and with Messrs. Lippmann, Rosenthal & Co. and other members of the committee, at Amsterdam.

On October 10th Messrs. Kennedy & Co. wire plaintiff in cipher, (Plff.'s Ex. 197, p. 328,) and in their letter of the same date they state the substance of the telegram, viz., that Carp is in London negotiating with Mr. Stephen for an extension of time and other "ameliorations." And they say: "This we have communicated to you for K. & H.'s information this morning by wire." (Plff.'s Ex. 155, p. 312.)

On Oct. 11th J. S. Kennedy & Co. send a cipher message to plaintiff, to the effect that the committee cable that the modifications proposed by Carp to Mr. Stephen in London are indispensable, and ask him to communicate this to Messrs. Kittson and Hill. And they add: "Infer [probably meaning we are ignorant] what modifications are demanded." (Plff.'s Ex. 198, p. 328.) On the 12th they wire: "Tell Vigor we believe Vocalist (the committee) will finally accept terms on gold basis." (Plff.'s Ex. 199, p. 328.)

On the 19th October they wire in cipher, requesting Mr. Farley to obtain from Mr. Thompson certain bonds deposited with him by the committee; that this is necessary to complete negotiations, and that it is probable the proposition will be accepted. (Plff.'s Ex. 200, p. 328.) And on the same day they write more fully to the same effect. (Plff.'s Ex. 156, p. 314.)

On October 20th, they send a long cipher message, repeating a cable from the committee, and ask plaintiff to communicate to Messrs. Kittson and Hill, and reply by cable. The substance of it seems to be that in the case of each issue the number of bondholders accepting the offer is less than the minimum fixed by Messrs. Kittson and Hill, (in their letter from Montreal of Sepr. 14th, pp. 537-

8,) "though far beyond real desired majority of whole outstanding indebtedness," and they wish plaintiff to reply by wire if this contents Messrs. Kittson and Hill, as the committee "wish to give public immediate decision." And they also say that if Messrs. Kittson and Hill authorize "Water" to continue acceptance of the balance, it is probable "Water" will soon obtain wanting amount. (Plff.'s Ex. 201, p. 329.)

This is the last of this correspondence introduced by plaintiff. But to give him the full benefit of it, the defendants have introduced his reply to the last message, being a telegram of Oct. 22d. "Vigor will answer telegram of twentieth. They do not want an over proportion of poor securities." (Defts.' Ex. 93, p. 1018.)

And this correspondence, which we have stated fully and fairly, is all the writing that plaintiff has to show in any way connecting him with the negotiations.

Messrs. Kittson and Hill are absent from the 6th to the 22d of September, negotiating and changing prices at Montreal on Sepr. 12th, and afterwards interviewing Mr. Litchfield; but not a line do they write to plaintiff to tell him what they are doing, or what they have done, or to ask him what they ought to do.

Besides these there is a much larger number of cipher messages between July 30 and Sept. 20, 1877, which relate wholly to plaintiff's drafts for money and other matters involved in the building of the cut-off, and have nothing in the world to do with the negotiations for the bonds. The Dutch committee, through J. S. Kennedy & Co., were furnishing the money to build the cut-off, and held all the stock and bonds of the company which they had plaintiff organize to build it, and Messrs. Kittson and Hill were entire strangers to it

The Fracas Over a Cipher Message.

Fisher makes these cipher telegrams the pretext for narrating quite a dramatic interview with Messrs. Kittson and Hill, at Mr. Kittson's office, (348, Q. 103; 363-4, C. Q. 78-81,) which he "will never forget in the world." (363-4, C. Q. 78-9.) But, though his attention was called to the telegrams *seriatim*, he cannot point out

that which occasioned the scene, nor state its subject matter. (364-7, C. Q. 82-116.) But while he cannot identify the telegram, he recollects that the occurrence was "in the summer of 1877," and says: "I know it was a very warm day—the day I went up to Mr. Kittson's office," where the fracas occurred. (167, C. Q. 114.)

Now the first cipher telegram produced is dated Aug. 21, 1877. (Plff.'s Ex. 173-4, p. 323.) That it was the first sent, relating to the bond negotiations, is evident from its subject-matter, and from the fact that plaintiff did not understand the cipher words for the names of the associates. (Defts.' Ex. 86, p. 1016.)

It has already been shown that Mr. Kittson was absent from St. Paul from sometime in July until Sepr. 1st, the day Messrs. Stephen, Smith and Angus came to that city for the Sunday trip over the road. On Sept. 6th he left with Mr. Hill for Montreal, and on Sept. 24th he had not returned, (Defts.' Ex. 89, p. 1017,) but was expected Friday P. M., the 28th. (Defts.' Ex. 90, p. 1017.) Between September 1st and 6th the only subject of any message would be whether the associates would meet Messrs. Kennedy & Co. in New York and Montreal. The scene, says Fisher, occurred in plaintiff's absence. But he was in St. Paul on Sept. 26th, 27th, and 28th. (Defts.' Ex. 90-92, pp. 1017-8.

In a "reply brief" in the circuit court, plaintiff's counsel argued that, as Mr. Kittson was apparently in St. Paul on Sepr. 2-6, the telegram in question *might have been* that of Septr 4th. (Plff.'s Ex. 182-3, p 325,) which (in translation, Ex. 183,) reads:

"Tell Vigor (N. W. Kittson and J. J. Hill) we desire to meet Village and Villain (Geo. Stephens, president Bank Montreal, and Donald A. Smith) and communicate result of meeting to committee of bondholders before tenth. If impossible to arrange meeting this week, ask Vigor (N. W. Kittson and J. J. Hill) to extend time for consideration proposition for term requested by Visitor (John Carp) or until meeting can be held; reply by cable."

But Fisher could not identify this message, and the claim is a mere *pis aller*. This message asks (1) a meeting or (2) an extension of time. The answer *actually sent* was that the associates would meet J. S. Kennedy & Co. at Montreal. This appears from their letter of Sepr. 6th. (Plff.'s Ex. 147, pp. 303-4.) Did Kittson and

Hill need Mr. Farley's consent to accept an invitation to New York or Montreal? And even had the matter involved an extension of time, such an extension was given in the telegram and letter of July 31st to Carp, (534-5,) without consulting plaintiff, and could it not be done again? (Hill, 607, Q. 232-4; Galusha, 1047, Q. 30-2.) Again: Mr. Kittson may have been in St. Paul on Sepr. 4th, but the story requires plaintiff to have been absent. Where is the evidence of his absence? And who would suggest repeating a cipher message to a man who had not the code with him? The August 21st message was evidently the first of the series. Hence plaintiff's inability to understand it.

The fracas was therefore after Sepr. 28th, and could not have been "in the summer," and hardly on a "very warm day." And between then and October, before Mr. Stephen had met any of the committee, and while negotiations were practically suspended, there could hardly have been any telegram of such a nature that the signing of plaintiff's name to the reply would occasion so violent a scene and such an outburst from Mr. Kittson as that which Fisher so minutely describes. (364, C. Q. 78.)

The messages of Oct. 9th, 10th, 12th, and 19th from Kennedy & Co., (Plff.'s Ex. 195-200, pp. 327-8) merely give information and opinions and require no reply, and show that during that period there could have been no messages the reply to which would be of any consequence. The next and last message, that of Saturday, Oct. 20th, (Plff.'s Ex. 201, p. 329,) was acknowledged by plaintiff on Monday, Oct. 22d, in a message saying that "Vigor" (Kittson and Hill) would answer it. (Defts.' Ex. 93, p. 1018.)

Fisher is in not much better case as regards this story than in his account of the negotiations beginning on very hot days and progressing until it was almost cool enough for a fire—and all between March 13 and June 3, 1876.

With this last cipher telegram of Oct. 22, 1877, ends all pretense of any evidence, beyond his own and his assistant's oral testimony, in any way connecting plaintiff *in any capacity* with any negotiations for the purchase of the bonds. And as a fitting appendix to them may be read his letter of ~~the~~ October 23d, already printed on page 148, *supra*.

The September Meeting at Montreal, and Mr. Stephen's Visit to England.

The meeting between the associates and Mr. Barnes is recounted in his letter of Sept. 24th, (Plff.'s Ex. 149, p. 304,) and has been already referred to. Besides their negotiations with Mr. Barnes, the four associates had much conference among themselves.

At Mr. Hill's meeting with Messrs. Smith and Stephen at Montreal in the preceding May, it had not been definitely agreed that the purchase of the bonds should be made, or that Mr. Stephen should raise or try to raise the money. All that would depend upon whether the bonds could be obtained at prices that would make the enterprise feasible. It was merely "understood that if we succeeded in getting the Dutch committee to agree to take the price for the bonds that we had determined upon, we should endeavor to find the money *in London* to pay for the bonds." (Stephen, 1231, Q. 39.)

For the same reason, and also because Mr. Kittson was not present, nothing was done at that time in the way of fixing the different interests, though it was, of course, tacitly understood that should the enterprise be carried out, Messrs. Kittson and Hill were to have an interest, the extent of it, however, not being determined. (Hill, 599, Q. 183; Smith, 1147-8, Q. 97; 1191, C. Q. 232.)

At this September meeting it appeared that the committee would accept the prices named in the letter of May 26th, with the changes made at Montreal, which did not materially affect the total price. Mr. Stephen was about leaving for England, and it was agreed that he should attempt to raise the money needed for the purchase at the prices thus arrived at, by way of a loan to the four associates, on the security of the bonds and such other securities as they could furnish; Mr. Stephen being also empowered to use in obtaining the loan such interest in the enterprise as should be required and he should think proper, which it was thought would be one-fifth.

And then it was that Mr. Stephen said they were "all in the same boat," and should be equally interested in the financial outcome. (Hill, 613, Q. 268-270; Smith, 1147-9, Q. 97-100; 1190-1, C. Q. 228-231; Stephen, 1235-6, Q. 67-77.)

But as an indefinite amount in excess of one-fifth might need to be used, the shares of the four could not be definitely or absolutely fixed. (Smith, 1190-1, C. Q. 228-231.)

At this Montreal meeting it was also considered desirable to ascertain, if practicable, at what price the stock of the First Div. Co. could be bought, and Messrs. Kittson and Hill accordingly visited Mr. Litchfield, but got no definite price from him. (Hill, 615-6, Q. 285-9.)

It was also part of Mr. Stephen's mission to have such negotiations with the committee as might be needed. And as they required a revision of the scale agreed on at Montreal, and other "ameliorations," (Plff.'s Ex. 155, p. 312,) such negotiations were had. (Id.)

THE FAILURE OF THE PROJECT OF BUYING THE BONDS FOR CASH.

These negotiations having been had, and the further changes desired by the committee in the scale of prices having been acceded to by Messrs. Kittson and Hill, the committee submitted the matter to the bondholders. The result was such that the committee seem to have thought that by acceptance of the "offer" (which was no offer) in the letter of May 26th, with prices as modified by subsequent negotiations, a contract of sale had been effected, binding, not only on Messrs. Hill and Kittson, (the persons making the "offer,") but on Messrs Smith and Stephen. (Kennedy, 1620-1, C. Q. 63-6.) And they seem to have made a public announcement that such a sale had been effected. (See their later announcement, on Feb. 8, 1878, which is Ex. G to Carp's Deposition, p. 539; Hill, 617, Q. 298-9.)

Mr. Stephen, however, could not induce his London friends (though offering them a one-fifth interest for a loan on the joint obligation of the four associates, with "all the security we are able to furnish in addition to security upon the bonds to be purchased") to invest so many millions on the security of a law suit, and he so notified the committee, and returned to Montreal, arriving there in the latter part of December, at which time "the negotiation was practically at an end." (Stephen, 1237, Q. 76-80.)

Thus terminated in failure the scheme of buying the bonds for cash.

The committee threatened legal proceedings against all concerned, to which it was answered that no contract had been made, nor had any liability been incurred by any of the four—least of all by Messrs. Smith and Stephen, who were not parties to the "offer" in the letter of May 26th.

And in this view the counsel of J. S. Kennedy & Co. concurred. (Kennedy, 1621-2, C. Q. 67; 1624, C. Q. 77; 1648, R. Q. 29.)

The committee were thereupon desirous that negotiations should be renewed. Having announced to the public that they had made a contract, they were perhaps loath to confess to their constituents that they had been outwitted in negotiation by novices of the backwoods of Minnesota. And it may be for this reason that they soon afterwards entertained and recommended a proposition to buy the bonds *on credit*, at the same prices arrived at in September, 1877, which they certainly would not have listened to under other circumstances. (Hill, 617, Q. 298-9.)

On Mr. Stephen's return, the associates met at Montreal, and a new scheme was devised *by Mr. Stephen* and acceded to by them, viz., to buy the bonds *on credit*, payment to be made after the foreclosures. (Hill, 616-7, Q. 290-6; Stephen, 1240, Q. 98-9.)

The Negotiations of 1878, and the Purchase of the Bonds on Credit.

About the end of December, 1877, Mr. Stephen called upon J. S. Kennedy & Co., in company with Mr. Watson, one of the New York agents of the Bank of Montreal, who introduced him to Mr. Kennedy and Mr. Barnes. They had long known Mr. Stephen by reputation, but had never met him. Mr. Kennedy asked if there was no hope of Mr. Stephen and his friends taking up the matter again.

Mr. Stephen "disclaimed any and all responsibility for the failure of the former negotiations, and said that if he was to do anything now the past must not be referred to; that we must let bygones be bygones, and there must be no recriminations for anything that had occurred in the past; and that if he did anything

we must start *de novo*, and that if anything was done, it would have to be *on an entirely different basis from that which had been suggested or proposed under the previous negotiations.* I asked him whether he had any proposition or suggestion to make, and he outlined to me on a piece of paper what his views were. After looking at them, I remarked that I thought what he indicated would serve as a basis for a negotiation. He then said that he would confer with Messrs. Smith, Kittson, and Hill, and try to get them to come on to New York early in the new year." (Kennedy, 1605, Q. 15; 1621-2, C. Q. 66-7.)

The four associates, with Mr. Galusha, thereupon met at Montreal, at the end of December or early in January:

"Mr. Stephen said he thought the way to do was to commence anew with Kennedy & Co., of New York. It was proposed to make the payments for the bonds, that is, for the purchase price of the bonds, fall due after the foreclosure sale." (Hill, 617, Q. 295-6.)

Mr. Stephen testifies as follows as to the origin of this plan, (1240.)

Q. 98. You have spoken of opening new negotiations with Mr. Kennedy early in January, 1878. Who originated the plan of buying the bonds on credit, on which those negotiations were based?

A. *I did.*

Q. 99. Who principally conducted those negotiations?

A. *I did.*

Early in January the four associates, with Mr. Galusha, met Messrs. Kennedy & Co. at their office in New York, and began negotiations on the basis proposed by Mr. Stephen.

In the evening, Mr. Hill and Mr. Galusha got together the substance of the day's work in the form of a memorandum, which was discussed the following day, and was to a great extent the basis of the agreement subsequently made. (Hill, 618, Q. 301.) The original paper, in Mr. Hill's handwriting, with pencil marks, made by Mr. Galusha or by Mr. Scott, (J. S. Kennedy & Co.'s counsel,) is Defts.' Ex. 13, p. 913. The pencil marks are replaced, in the copy, by marks in red ink. (Hill, 618, Q. 302-4.) The discussions lasted several days, and ended in a formal proposition on behalf of all the associates, to be made public in Holland if approved by the committee. (Hill, 618-9, Q. 305-311.)

Messrs. Kittson and Hill, with Mr. Galusha, left for home on

Saturday evening, Jan. 5, 1878, as Mr. Kennedy writes to plaintiff in a letter of Jan. 7th. In that letter he also says: "*Mr. Hill will explain to you the situation of matters here*, and the prospect of closing the negotiation with the Dutch committee, which I hope and believe will go through." (Plff.'s Ex. 158, p. 315.)

Mr. Hill would, in the usual course of things, arrive at St. Paul about the 8th or 9th, but it will appear that *he did not "explain the situation" to plaintiff.*

Upon agreeing to a proposition to be sent to the committee, the associates at the same time made a memorandum of agreement between themselves. As this was replaced by more formal instruments at later dates, the nature and effect of these agreements will be considered under a separate head.

Arrived at home (about Jan. 8th) Mr. Kittson remained in St. Paul until about the 24th, when he went to New Orleans, and did not return to St. Paul until March 16th, after the formal and final agreement (of March 13th) with the committee had been executed. The evidence of his absence is collected at page 137, *supra.*

Mr. Hill, however, remained in St. Paul until after the adjournment of the legislature early in March.

During January and the early part of February, negotiations were had with the committee on the basis of the proposition, and certain modifications were agreed to. And on the 8th of February the committee published, in a Dutch translation, the substance of the proposition as thus modified, and recommended its acceptance by the bondholders. This proposal, retranslated into English, is part of Exhibit G to Carp's Deposition. (539, 543-5.) It was open for acceptance by the bondholders only until Feb. 22d. (543.) The substance of it will also be found in Mr. Barnes' letters to plaintiff of Feb. 19th and Feb. 27th, written in answer to his requests for information. (Defts.' Ex. 46, 47, pp. 993-5.)

In this last letter (Ex. 47, p. 994,) are stated the minimum amounts of each issue the holders of which must accept to make the offer a binding contract. And there is also a statement of the amount of bonds of each issue, the holders of which had accepted the proposal. These amounts were less than the required minimum of most of the issues, but the letter states that "Messrs.

Stephen and associates *have accepted these amounts*, and extended the time for two weeks for other bondholders to come in." (994.)

It was this action of the associates of which Kennedy & Co. advised the committee by cable of Feby. 25th, and which closed the transaction, so that Mr. Kennedy could say in his confidential letter of that date to plaintiff. "The purchase has now been concluded. We have so advised the committee at Amsterdam by cable to-day, and it will be publicly announced there to-morrow morning." (Plff.'s Ex. 162, p. 317.)

While the associates were conferring at Montreal and nogotiating at New York, *not one line was addressed by any of them, not even by Mr. Kittson, to the plaintiff*, to ask for "facts, information or advice," or to inform him of what was going on. He was advised by Mr. Kennedy's private letter of Jan. 7, 1878, (Plff.'s Ex. 158, p 315,) that the negotiation was likely to succeed. And on Feb. 8th, J. S. Kennedy & Co. write that they "suppose that the bondholders will now accept the offer of Messrs. Stephen and associates." (Plff.'s Ex. 160, p. 316.)

As before stated Mr. Hill did not fulfil the expectation expressed in Mr. Kennedy's letter of Jan. 7th, (Plff.'s Ex. 158, p. 315.) But *Mr. Kittson*, after his return, (about the 8th or 9th) and before his departure for the south (about Jan. 24th) seems to have had a talk with plaintiff, about as follows, according to the account given by Mr. Hill of what was told him by Mr. Kittson:

Plaintiff said to Mr. Kittson, "Well, you fellows have bought the bonds," or something to that effect. Mr. Kittson then asked him, jestingly, if he wouldn't like to take a small interest with them. Plaintiff said he had no money, and Mr. Kittson said it would take "a barrel of money," and the matter dropped, Mr. Kittson regarding the talk as "chaff." (Hill, 625-6, Q. 350; 819-820, C. Q. 719-722.)

Mr. Hill's testimony (given in Mr. Kittson's lifetime) may not be strictly competent, though it is as much so as three-quarters of that introduced by plaintiff. And it is true that the conversation is denied by plaintiff. But Mr. Kennedy testifies (1599-1600, Q. 13; 1604-5, Q. 15,) to like statements by Mr. Kittson to himself in March, 1879, and again so late as 1886, in regard to this "offer" or

"intimation." And he also says that in April, 1878, plaintiff himself told him he had once been offered a small interest, and had declined it, and asked his advice as to whether he should seek a renewal of it. (1597, Q. 12; and see 1599, Q. 13.) And plaintiff's own letter of Feb. 22, 1878, (Defts.' Ex. 72, p. 1009,) printed, *supra*, p. 149, states in so many words that some such suggestion had been made, although plaintiff, perhaps, like the Dutch committee, saw an offer where none existed. In this letter he writes: "It has been more than intimated to me that Mess. H. & K. would be pleased *to make* me interested in their shares of what may result from this trade." He swears (164, C. Q. 248-251,) that he wrote nothing to Messrs. Kennedy & Co. or either partner that he did not believe to be true when he wrote it. And this letter shows very clearly that some such talk had taken place.

And this talk, and a letter of Mr. Kennedy of April 4, 1878, (Deft.'s Ex. 56, p. 998,) *probably first put into plaintiff's head the idea that he might obtain some interest in the enterprise, or might make something out of the associates;*—his *original* idea, *which he carried out*, being (as he says in his letter of Aug. 23, 1876, to Barnes) to "make some money" by bond speculations of his own, based, it is true, on the enterprise of the associates.

After Mr. Hill's return, and on Jan. 24, 1878, Kennedy & Co., for Mr Stephen, sent him a cipher message a copy of which, with a translation, (Defts.' Ex. 12,) is enclosed in a letter, (Defts.' Ex. 11, p. 912,) in which they say that they sent the telegram the day before, "making use of our cipher code, to which you will be given access by Mr. Farley. We shall be glad to furnish you with a copy for your own use if you desire it." The copy was furnished (Hill 610-1, Q. 253-5; Kennedy 1640-1, R. Q. 6,) and plaintiff, being no longer a channel of communication, *was left to gather information by direct appeals to Messrs. Kennedy & Co.*

On Feb. 9, 1878, plaintiff went to Dubuque, and on the 12th he writes from that city that he will be at home on the 14th. (Defts.' Ex. 148, p. 1498.) In his absence, and on Feb. 12, 1878, an article appeared in the St. Paul Pioneer Press, stating that the arrangement for purchase of the bonds was completed except the execu-

tion of some details. (Farley, 1462, R. Q. 87.) And at once on his return home, he writes to J. S. Kennedy & Co., on Feb. 15, 1878:

"Would it be asking to much of you to give me a short condenced Statement of the contract Between the Dutch Bondholders and Hill, Kittson & Co. How many of each kind of Bonds do our Friends get, price of each and *how* and *when* do they pay?" (Defts.' Ex. 71, p. 1009. And see p. 149, *supra.*)

And this autograph letter (of which plaintiff *had kept no copy*) was written by the man who, as he says, invented the scheme, and directed the negotiations; who swears that it was his knowledge and judgment which fixed the prices to be paid; that he was one of the purchasers; that Mr. Hill, on returning from New York, informed him of the terms of the proposal that had been made; (102, Q. 255;) that "my recollection of what I knew about it (the bargain for the bonds) I got from Mr. Hill. *Mr Hill was very familiar with me then, and told me everything.* I have no doubt in the world that he told me everything about it at the time it was done, and he was aware of that fact. *There was no secret between Mr. Hill and myself at that date about this transaction;*" (1467, R. Q. 100;) that his interviews with Mr. Hill at that time were frequent, and "*Mr. Hill professed to keep me posted thoroughly on what was going on as per original contract;*" (103, Q. 258;) and that I got "*news most every day from Kittson and Hill while the thing was progressing;*" and it was written while Mr. Hill was in St. Paul, where he remained continuously from about the 8th or 9th of January until March.

(Letters and Telegrams from Mr. Hill to J. S. Kennedy & Co., and to Mr. Stephen, of Jan. 26th, Feb. 8th, Feb. 13th, Feb. 21st and Feb. 22d, are in evidence as Defts.' Ex. 96, p. 1020; Ex. 123, p. 1301; Ex. 124, p. 1302; Ex. 97, p. 1022; Ex. 98, p. 1023. And see Test. Hill, 636-7, Q. 402.)

If plaintiff's statements that Mr. Hill kept him informed were true, he would have had no occasion to seek information from Kennedy & Co. And if he were an associate with Mr. Hill—especially an associate to whom, as he would have it believed, Mr. Hill and Mr. Kittson looked up for direction,—he would certainly have

addressed his inquiries to Mr. Hill, and not to Messrs. Kennedy & Co.

On Feb. 19th, *Mr Barnes*, writing for Kennedy & Co., answers his inquiries, giving him the prices, terms of payment, etc., but does not tell him how many bonds the associates bind themselves to take. He also says:

"We supposed Mr. Hill and Mr. Kittson had told you the terms of their present offer, which we are now awaiting the action of bondholders upon—otherwise would have posted you fully upon it. We have had such an immense amount of correspondence in regard to it that we left to Mr. Hill to make explanations to you. * * * *As Mr. Hill has not given you the details of this offer, please regard the above as strictly confidential.*" (Defts.' Ex. 46, pp. 993-4.)

This letter was written at a time when the plaintiff does not pretend that Mr. Kennedy or Mr. Barnes had any inkling that he was interested or had been offered an interest. Mr. Barnes thought that, *as the representative of the bondholders in Minnesota*, plaintiff would have been informed by Messrs. Kittson and Hill of the terms of the contract they had made with the bondholders' agents in New York. (See also Mr. Kennedy's letter of January 7, 1878; Plff.'s Ex. 158, p. 315.)

Mr. Hill states, however, that while plaintiff was informed of the fact that the associates were likely to acquire the bonds, he had reasons for not telling him, and did not tell him, anything more, regarding him as not friendly to the associates, and favoring the C. & N. W. Ry. Co., which was not friendly. (Hill, 689-690; Q. 609-611.)

As Mr. Barnes had not told him *the amount* of bonds the associates were *required* to take, plaintiff makes this the subject of inquiry in an autograph letter of Feb. 22, 1878, (Defts.' Ex. 72, p. 1009,) one of the group of letters already printed, (*supra*, p. 149,) and which could never have been written if plaintiff's testimony in this case is true, or if he were already interested with Messrs. Kittson and Hill. To this Mr. Kennedy hurriedly replied on the date of its receipt, Feb. 25th, (Plff.'s Ex. 162, p. 317,) and on February 27th, *Mr. Barnes*, for his firm, fully answers the inquiries. (Defts.' Ex. 47, p. 994.) An expression in this letter was relied on by plaintiff's

counsel. After saying what the four associates have bought, etc., he adds: "We believe these figures will cover your inquiry. We shall have great confidence in the future success of this enterprise, if you continue your connection with it." (994.) This means not any connection of plaintiff with the *purchase of the bonds*, but his connection with the still uncompleted enterprise of building the St. Paul & Pacific railroad. *Barnes* did not know that plaintiff had or had been offered any "connection" with the former. Testifying in July, 1888, plaintiff himself says that "when we were in New York, in March or April," 1888, (taking Nichols' deposition) he had a talk with Barnes, in which Barnes said "he had no objections to my being interested, but he thought I ought to have informed him. That was some three months ago. He said I ought to have said something on that subject to him; he said that *considering the intimacy that existed* between *himself and me*, I ought to have informed him about it." (1381, Q. 136.)

It may be said (and Mr. Kennedy's letter of Feb. 25th may have been introduced by plaintiff to support such a position, as well as to sustain his averment in his amended bill, p. 7, of disclosure of "his said interest" to Mr. Kennedy before the negotiation was closed,) that the fact of plaintiff making inquiries of J. S. Kennedy & Co. goes to show that he had an interest—and we concede that it has just as much tendency in that direction as does most of the rest of plaintiff's evidence. But it might as well be said that plaintiff was jointly interested with the Dutch committee, because, when he became general manager, and before he formed any project for acquiring the bonds, he made inquiries as to the amount and ownership of the outstanding indebtedness. According to plaintiff himself, he exercised an enlightened curiosity in regard to a great many subjects. And there were four reasons why he might seek this information, aside from this general curiosity as to all matters connected with the property. (1) J. S. Kennedy & Co. had kept him advised of the negotiations and supposed agreement of the preceding summer and autumn, and it was natural that he should wish to continue to be advised. (2) Should the purchase be made, it would affect the duration of his own tenure of office, and his position while it lasted. The purchasers would press forward to the

acquisition of all the mortgaged property, and, when they got it, Mr. Farley's connection with the road would depend upon their decision. And in the mean time they would be his paymasters, under the order of Dec. 19, 1874, (Defts.' Ex. 158, p. 1551-2,) in so far as he was receiver, and his masters, in fact if not in name, in so far as he was general manager. (3) It had been "more than intimated to him," as he thought, that he might be allowed to acquire a small interest in the purchase, and hence he wished to know what obligations he would have to assume, should he become interested. (4) *He had bonds to sell*, the value and price of which would depend largely on the bargain made by the associates with the great mass of bondholders.

His inquiry, therefore, has no tendency to show that he was interested, while, under the circumstances in which it was made, it shows conclusively that he was not.

Perhaps as complete a *non sequitur* as anything in plaintiff's case is his conclusion that "*before the purchase of said bonds* or any of them, and while negotiations were pending for the purchase of the bonds represented by the said Kennedy as aforesaid, he, the plaintiff, informed the said Kennedy of *his said* interest and connection with the said Kittson and Hill in the project for the purchase of said bonds, and that the said Kennedy had full notice and knowledge that he was so connected therewith and interested therein, and fully approved and sanctioned the same," (Amended Bill, par. III; page 7)—and all this because he wrote on Feb. 22d: "It has been more than intimated to me that Mess. K. & H. would be pleased *to make* me interested in their shares of what may result from this trade," adding: "My judgment is some of these Bond is cheap at the price named, and others very much higher that *I* would pay," (Defts.' Ex. 72, p. 1009,) which letter was received by Mr. Kennedy *after* the negotiations were closed, and to which he replied: "We think it will pay you *to take* an interest with K. & H., and we are glad to hear that they *have offered it to you.*" And this is adduced to show that Mr. Kennedy knew that plaintiff was *already* interested with the defendants, knew that he was *equally* interested with them, knew that he had been so interested *from the outset*, and knew that this interest *involved no pecuniary*

liabilities, but only the obligation to furnish facts, information and advice—in short to show that Mr. Kennedy knew of "his *said* interest," theretofore set out in his bill.

After the acceptance by the associates of the amount of bonds that had assented by Feby. 22d, and their extending the time for further adhesions, the only incident of note was the renewal by plaintiff's friend, Carp, of ~~his~~ his little ~~bill~~ claim for "$200,000 common," early in March. The associates, however, do not seem to have recognized these "claims". (Defts.' Ex. 100, 101, p. 1023-4.)

And on March 9th we find plaintiff consulting Mr. Barnes whether or not he should sell to the associates the bonds and certificates he had brought the preceding summer. This letter is printed *supra*, p. 150.

On the same day (March 9th) Mr. Kennedy in a "private" letter, writes plaintiff asking him to "aid Kittson and Hill in any way you can, as *they and their friends* are now really the owners of the property; and as soon as some details are completed, we will leave *them* to say which shall and shall not be done"—a singular letter *if Mr. Kennedy was fully informed that plaintiff had the interest he claims, or any interest, with those gentlemen.* (Plff.'s Ex. 163, p. 318.)

On March 13, 1878, the final agreement with the committee was executed in New York by the associates. *Mr. Kittson not having returned from New Orleans*, it was executed for him by Mr. Galusha, as his attorney in fact. (Schedule A. to Answer, p. 44; Defts.' Ex. 122, p. 1301.)

The Newspaper Episode.

But prior to this time an incident occurred, which has given occasion to another of plaintiff's and Mr. Fisher's inventions and narations of fictitious interviews.

In a letter of Feb. 18th, (Plff.'s Ex. 161, p. 317,) which doubtless suggested the story, J. S. Kennedy & Co. write in regard to certain newspaper articles which they say are premature, and are likely to make delay by leading the Dutch bondholders to suggest additional terms, if they think the associates "are fully compromised, while they themselves are free."

His attention being called to the letter, plaintiff says that at about the date of it (Feb. 18th) Mr. Kittson called upon him, was very much excited, charged the publication upon Mr. Hill, said it was something he had all along been afraid of, and blamed Mr. Hill for the whole of it. Mr. Farley, however, interceded for Mr. Hill:

"I told him that I should look over any imperfection of this kind that Mr. Hill had committed; that this negotiation was pretty well settled and accomplished; and that 'Jim' as we called him, was entitled to a good deal of credit for the energy and persistency with which he had pursued this matter; and called his attention to the fact that *he and myself*, during the long pending negotiation, *had frequently been discouraged*, so much so that we would have most likely abandoned the thing entirely if it had not been for 'Jim Hill.'" (103, Q. 257.)

Fisher, as usual, paints the scene a little more vividly than plaintiff. He says that "it was in the winter of 1877 and '78, I think," and, after giving the place of the talk, proceeds:

"They were talking about this article, and Mr. Kittson said it was given away by Mr. Hill. He said they couldn't hold *the fellow* anywhere; that the thing was not all closed up yet, and he was afraid it might do some harm in the negotiations. And Mr. Farley told Mr. Kittson that they ought to have *some charity for Mr. Hill;* that *he had a good many good qualities;* that he would hang on like a bull-dog; that 'if it hadn't been for Mr. Hill's hanging on here, *you and I would have got discouraged and given the thing up.*' Mr. Kittson says: 'Yes that's so. *You and I will have to work together*, Mr. Farley, and try *and hold Jim level.*'" (350, Q. 111.)

That Mr. Kittson should have talked thus of his associate to plaintiff, even if he had been interested, is out of all keeping with Mr. Kittson's character; and that he should have spoken thus in the presence of *an underling* like Fisher is simply incredible. On its face the story is an invention and a malicious one.

But here as elsewhere events of which plaintiff and Fisher were not informed by Kennedy & Co.'s letters prove their statements to be false.

It was deemed necessary by the associates that the legislation of 1877 (Sp. Laws 1877, *c.* 201) should be modified by extending the time for building from Melrose to Sauk Centre, (which had been limited to July 1, 1878,) and by repealing the provision in section

9, which reserved, to meet DeGraff & Co.'s claims, one-half of the first 400,000 acres that should be earned by building from Crookston to St. Vincent.

The Dutch bondholders were, and deservedly, not in favor with the legislature. Ever since 1873 they had been promising much but doing nothing, and the St. Vincent extension remained unfinished, while the completion of the Brainerd branch had been secured only by a forfeiture, and a regrant to the Western Railroad Co.

It was necessary to satisfy the legislature that if these concessions were made, the road would be speedily built, and *for that purpose*, and *to avail themselves of the potent argument that the enterprise was now a home and not a foreign* one, *it was absolutely necessary* for *Mr. Hill*, in his attempts to disarm the opposition from the Sauk Valley and Fergus Falls districts, and in combating the combined forces of the Northern Pacific Co., the First Division Co., and DeGraff & Co., *to say to the legislature and the public that the application was made*, not *on behalf of the unpopular Dutchmen and their receiver*, but *on behalf of our own citizens, who had bought the bonds*, and who had agreed to finish the lines, and had the will and the ability to do it.

And in this struggle it was impossible, even if desirable, (in view of the contest in the legislature) to muzzle the newspapers. Their friendship was valuable, essential, and Mr. Hill took care that the publication which was required by the exigencies of their interests in Minnesota should be such as would do no harm to their interests in Holland.

And accordingly on Feb. 13th, Mr. Hill writes to Mr. Stephen, (Defts.' Ex. 124, pp. 1302-3:) "Tomorrow we expect to have the bill introduced into legislature to repeal De Graff bill of last winter, and, as we are the active movers, we have had to allow the newspapers to allude in a general way to the probability of the early completion of the line to St. Vincent, etc." And so, on Feb. 21st, Mr. Hill writes to Kennedy & Co., (Defts.' Ex. 97, p. 1022:) "The newspaper announcement was the inevitable result of our going into the legislature for the repeal of the De Graff clause of last winter's bill, and we took pains to see that the

allusion was made in the most general terms." These letters show that Mr. Hill was fully aware that matters in Holland might possibly be affected (as they were not in fact) by a publication in St. Paul before the requisite proportion of bondholders had assented.

The strongest argument used against Mr. Hill in the legislature was that the associates had not got the bonds; that they were merely acting for the committee, and that at any rate, the result of the negotiation was uncertain. Mr. Becker produced telegrams from Mr. Litchfield to that effect, and Mr. Hill wired Kennedy & Co. for proper authority for contradicting them. (Defts.' Ex. 98, 99, p. 1023.)

Mr. Hill, in his testimony, gives a clear statement of the whole matter. (636-8, Q. 402-8.) And Mr. Kittson would have shown himself as ignorant as plaintiff of the purposes and needs of the associates, had he been guilty of any such outburst as is charged to him.

And conclusive proof that the story is a falsehood, invented to help plaintiff's case and vent his malice against Mr. Hill, is afforded by the fact, proved by defendants *after* Farley and Fisher had sworn to this story, that Mr. Kittson was absent from St. Paul from about January 24th until March 16th (*supra*, p. 137,) at which date the article would have become obsolete, the final agreement having been already executed in New York.

And *this is not the only instance* where the plaintiff has invented and sworn to conversations with Mr. Kittson during this period of his absence. In his testimony on the plea he swore that when the agreement of March 13, 1878, was about to be executed in New York, Mr. Kittson asked him to go on with himself and Mr. Hill, and "be in attendance there; but other duties, and knowing what the provisions of the contract were very nearly, I didn't go on." This will be found quoted in R. Q. 96, 100, p. 1466-7. This conversation cannot possibly be transferred to any other date, for *but one contract* was signed in N. Y., and plaintiff knew of its contents only by Barnes' letters in Feby., 1878.

After plaintiff had been called and examined by defendants on matters having nothing to do with the publication or the interview sworn to by him and Fisher, his counsel, in a "cross-examination,"

showed him a newspaper article of October 27, 1877, (which he afterwards admits he had not seen from that date to the day of his examination in July, 1888,) and he said: "I am very thoroughly convinced now, after hearing that communication read, that that is the one I had reference to," in the testimony given in October, 1887. (1433, C. Q. 14.) Upon this new matter, the defendants cross-examined Mr. Farley. By his statements then made, it appears that *after* the defendants, in their evidence, had shown the occasion and need of the publication, and *had shown, moreover, Mr. Kittson's absence*, and had thus proved Farley's and Fisher's story to be a malicious falsehood, plaintiff's solicitors "insisted that I had made a mistake there." (1456, R. Q. 64.) "They saw the mistake, and, *having so much confidence in my desire to tell the truth*, they put themselves to the trouble of finding out how this thing had happened." (1457, R. Q. 67-8.) Plaintiff says he had no opinion about it till the article of Oct. 27, 1877, was produced and read before the examiner, (1456, R. Q. 61, 65; 1458, R. Q. 70,) and then *he is at once "satisfied"* that it and not the article of Feb. 12, 1878, is the article which excited Mr. Kittson's wrath. He is, however, *wholly unable* to point out anything in the article of Oct. 27th which should make him change his testimony, except that in the article of Feb. 12th there was an extract from another newspaper, (and in the October article there was an extract from the same newspaper,) and the October article "was all laid to Jim Hill; and it was a pretty correct statement, also, as coming from somebody that knew all about it." (1464-5, R. Q. 90.)

But this story of Farley's and Fisher's, like their story of the circumstances attending the original agreement, is a structure that will not bear moving. Prior to February there was a time—when Mr. Stephen failed to raise the money, and the Dutch committee took an angry and a threatening attitude—when Mr. Kittson and Mr. Hill might well have despaired of success. But nothing of the kind had happened on Oct. 27, 1877. Till then plaintiff had made everything easy. From the time he took hold, there had been no delays, no obstacles. He had opened the way to negotiations through Carp, in December, 1876; those negotiations had gone along, not hurriedly indeed, but steadily and smoothly, as befitted

such an enterprise directed by such a man. And there were no fears as to Mr. Stephen's ability to procure the money.

And the October article contains palpable errors, (as in stating that three-fifths were to be owned by Messrs. Kittson and Hill,) which show that it could not have been inspired by Mr. Hill, and Mr. Kittson could not have attributed it to him. It evidently proceeded from some half-informed and imaginative newspaper man.

In any interview occasioned by the October article, Mr. Kittson could not possibly have used the words sworn to by Farley and Fisher, nor could plaintiff have spoken as they say he did. In October, the excuses for Mr. Hill are absurd, even had that article been at all objectionable.

And for anything that appears the October article was in no way objectionable. Its misstatement about the division of interests could hurt nobody. The article of Feb. 12th was criticised only because premature, as the bondholders had until the 22d to accept the offer of purchase, and, if they supposed the associates were committed by the publication, they might embarrass and delay the negotiation by proposing new conditions. But the article of October 27th could have had no such consequences. On the contrary, the bondholders had then accepted the prices named by the associates. *They* were bound. On October 20th the acceptances of each issue were "far beyond the real desired majority," though not yet reaching the minimum named by Messrs. Kittson and Hill, and the committee asked them to be content with these, in which case the committee would immediately publish the decision. (*supra*, p. 159.) The situation, in this respect, was just like that on Feb. *22*, 1878, when the associates accepted the assents already given, though less than the minimum named in their offer. But the issue is not, was either article ~~was~~ wise or foolish? but was plaintiff swearing to facts or inventions when he swore to this *and other* conversations with Mr. Kittson during the latter's absence in New Orleans?

Plaintiff says he was absent on the day of publication, (this is true of the article of Feb. 12, 1878; see *Supra*, p. 169-170 but not shown to be true in October,) and that the interview was after his return some days later. (1455, R. Q. 60, 1470, R. Q. 113.)

Plaintiff's cross-examination by defendants on this subject will be

found in pp. 1455-1470, R. Q. 60-113. The plaintiff did not call on Fisher to change his testimony, and it stands as he gave it, *with the conversation in the winter.*

It was claimed in argument in the circuit court that neither article was produced to plaintiff till his examination in July, 1888. But plaintiff admits that the article of Feby. 12, 1878, was present and read by or to him when he gave his first testimony in October, 1887. (1459-1460, R. Q. 76-81.)

The testimony on this point, taken together, shows that the letter of J. S. Kennedy & Co., of Feb. 18, 1878, (Plff.'s Ex. 161, p. 317,) suggested to plaintiff and Fisher a story which, as they thought, would at once help make out their case, and at the same time disparage Mr. Hill. And plaintiff remembered the fact of the publication in February, because it gave him *his first* information that the committee *had accepted* the proposal of the associates (Kennedy & Co. having written on Feby. 8, that they suppose the bondholders *will* accept; (Plff.'s Ex. 160, p. 316,) and because it was the occasion of his letter of Feb. 15th, which obtained for him his first knowledge of the *terms* of the proposal of the associates. The newspaper was accordingly hunted up and a story made to fit this date, and including not merely Mr. Kittson's wrath, but plaintiff's soft answers. And they so adjusted the story to this date that, (like the story of Mr. Kittson wishing plaintiff to attend when they were about signing the agreement of March 13, 1878, 1466-7, R. Q. 95-6, 100,) it could not have taken place at any other time. And in attempting to locate it at a different time, plaintiff merely shows his willingness to swear to anything needed to correct the "mistakes" which have been exposed by the defendants, and to one proved falsehood adds another, as palpable and as useless.

The Agreement Between the Associates.

As already noted, at the date of the Montreal meeting between Messrs. Smith, Stephen, Kittson and Hill in the first half of September, 1877, and prior to Mr. Stephen's departure for England, the associates had come to an understanding that whatever interest Mr. Stephen should not dispose of in England to aid in procuring

the needed funds, (and it was expected that he would not be required to use more than one-fifth,) should be equally divided among the four; but no definite interests were or could be specified. And as it was not certain that the purchase would be made, and as none of them were incurring or intended to incur any obligations until an actual purchase, there was no need of any more definite agreement. But as soon as they made a formal offer for the bonds, on January 5, 1878, they at once made an informal memorandum of their agreement. (Hill, 619, Q. 312-3.)

The enterprise in which they were then engaged had been devised by Mr. Stephen, on the failure of that which Messrs. Kittson and Hill had so long pursued with Mr. Smith. Messrs. Kittson and Hill at no time pretended that they were bringing Mr. Smith or Mr. Stephen into an enterprise of their own, or of their own and Mr. Farley's. It was always considered that *they were being admitted into the enterprise*, first *of Mr. Smith*, and *then of Mr. Smith and Mr. Stephen*. (Smith, 1147, Q. 96; Stephen, 1239-1240, Q. 95.) And accordingly they never proposed to give any interest to Mr. Stephen or Mr. Smith, and never named any interest that they should themselves either retain or receive. (Smith, 1149, Q. 101; Stephen, 1236, Q. 70; 1239-1240, Q. 95.) And when they first made a definite agreement between themselves, on making the offer of Jan. 5, 1878, *the shares allowed to Messrs. Kittson and Hill were fixed by Mr. Stephen*. (Stephen, 1239, Q. 90-94.)

Soon after Jan. 5, 1878, a formal contract between the associates was drawn up and signed, bearing date Jan. 21, 1878. (Defts.' Ex. 14, p. 915.) And at a meeting of the associates in Montreal, after the execution of the contract of March 13, 1878, with the Dutch committee, their own agreement of Jan. 21st was superseded by a more elaborate document, providing for contingencies not mentioned in the former. This agreement bears date and was executed March 27, 1878. (Defts.' Ex. 118, p. 1268.)

As to these agreements it is to be observed: Mr. Smith was an old and intimate friend of Mr. Stephen and of Mr. Kittson, while Mr. Kittson and Mr. Hill had long been intimate in business and other relations. The four had, during several months, been closely

associated in the negotiations of 1877. Yet when they engage in a transaction involving any liabilities, they make a formal agreement, reciting the enterprise, defining the interest of each, and concluding as follows:

"*Having full confidence in each other*, and in the success of said enterprise, we hereby mutually agree to become responsible for the repayment of all moneys required to be advanced to us in carrying out said purchase, (if said offer be accepted,) and to join in the execution of any papers or securities that may be required in obtaining such advances." (916.)

And to this they set their hands and seals.

This is very unlike what plaintiff says was done in the case of *his* agreement, where no one thought of putting it "in black and white," until success was assured, and little left to be done but to divide the profits.

The final agreement of March 27th contains provisions entirely inconsistent with the notion of any interest on plaintiff's part. It is expressly agreed that, on the death of any party, the others shall succeed to his interest, upon paying to his legal representatives $75,000, and assuming all his obligations, and procuring the surrender of all securities he may have pledged as collateral—a provision which, in the event of death of Mr. Kittson and Mr. Hill, or one of them, would have wholly or partly defeated plaintiff's alleged interest; a provision they could not have agreed to, would have had no right to agree to, if plaintiff had had the interest he claims or any interest with them. And it is provided that no one of the associates may part with his interest without first offering it to the others. (Defts.' Ex. 118, pp. 1269-1270.)

The plaintiff's confessions under oath, so late as 1880, of his complete ignorance of the interests of the parties under this agreement, and the inevitable inferences from such ignorance are shown, *supra*, pp. 20-22.

These agreements, moreover, mark with great clearness an essential difference between the enterprise which the plaintiff says he agreed on with defendants and that in which they actually engaged. The former, besides being one originated by himself, was an enterprise for which neither he nor they were to furnish any money, and in which neither he nor they were to incur any

pecuniary responsibility. The latter—the enterprise actually undertaken and carried through—was an enterprise not originated by plaintiff, into which the defendants were admitted by Messrs. Smith and Stephen, receiving the interests allotted to them; in which they, as well as Messrs. Smith and Stephen, were to join and did join in procuring funds, and incurring money obligations, and furnishing securities therefor. The difference between the two enterprises is the same in kind and at least equal in degree with that which the Minnesota supreme court held fatal to plaintiff's first complaint, in *Farley* v. *Kittson*, 27 Minn. 102.

The character and extent of the obligations assumed and risks incurred by the defendants in their agreements with Messrs. Smith and Stephen are stated by Mr. Hill. (630-6, Q. 373-399.) Besides their bond to the Dutch committee and their agreement with the court to furnish the million or more needed to finish the extension lines, they joined at the outset in a note for $280,000, on which was raised the money to pay the expenses of the committee; in a note of $140,000 for funds to meet their first six months' interest; in a note of $250,000 as requested in Mr. Stephen's letter of Oct. 25, 1878, (Defts.' Ex. 23, p. 922;) in raising the $500,000 to pay Mr. Litchfield for his stock. And to secure these obligations they pledged every available security they possessed. The documentary evidence on this point is collected in Table III, prefixed to this argument.

If the enterprise had miscarried, they would all, in Mr. Kittson's words, have gone to the poorhouse. And when their labors and their risks have been crowned with success, in comes the plaintiff and demands a division of profits on the strength of an earlier alleged agreement, involving no risks and no obligations, for an enterprise which had proved wholly chimerical and abortive. For such a claim there is neither law, equity nor reason to support it, even if his alleged agreement had been made.

In the circuit court plaintiff's counsel showed much interest in the disposition made of the extra one-fifth. They questioned Sir Donald Smith, (1191-2, C. Q. 233-7,) who did not know, and Mr. Kennedy, (1609, C. Q. 18-19,) who did not even know of any division into fifths, but they carefully abstained from questioning

Sir Geo. Stephen, who made the disposition. And they thereupon made it a point, in argument, against the defendants, that "the full truth on this subject is not revealed to the court," and *therefore* this one-fifth (reserved for use in raising money) must have been originally reserved for plaintiff—the one man who was not to raise any money.

The Dealings of the Associates with Mr. Farley after the Agreement of March 13, 1878.

As the dealings of Messrs. Kittson and Hill with plaintiff from the time when Mr. Hill, in his letter of August 23, 1877, to Mr. Stephen, (*supra*, p. 154,) mentioned him as the agent of the Dutch bondholders, down to the time when he was left to get from J. S Kennedy & Co. whatever information he ever had of the bargain with the committee, and was left in total ignorance of the agreement between the associates, show that Mr. Farley was never regarded by Messrs. Kittson and Hill as an associate, so their dealings with him from the time of their purchase of the bonds show that they continued to regard him *not* as an associate, but simply as receiver and general manager, and his own conduct shows that he did not regard himself as an associate.

Upon the making of their contract for the purchase of the bonds the associates were in this position: They were bound by their contract to complete the St. Vincent extension. And it was necessary for them to do it to save the land grant. Mr. Hill had secured an extension of time to build from Melrose to Sauk Centre until August 1st, and to Alexandria until Dec. 1st. Should they fail to comply with the law, the land grant, which formed a principal element in the value of the bonds, would be forfeited. And, though not obliged to build to St. Vincent during 1878, the construction of this line within the year was of great importance to their plans for controlling the Canadian road from St. Vincent to Winnipeg, known as the Pembina branch.

These lines, being in the possession of the receiver, could only be built under order of the court, and plaintiff had been appointed receiver to build them. And as to the First Div. Co., though the

associates had contracted for the bonds, they were not yet "in the saddle." Mr. Kennedy, as trustee and agent for the Dutch committee, must be deferred to. Plaintiff was Mr. Kennedy's protege, and, as receiver, he had the ear and the confidence of the court. In obtaining the order he might do much to aid or hinder them. In carrying out the order, the success or failure of the associates in saving the land grant might largely depend upon the zeal and good faith of the receiver. The time was very short. Should the receiver be wanting in zeal and energy, irreparable harm might be done, even though the associates should succeed in procuring his removal, or other aid from the court. And in any such case they would have up-hill work. The court would stand by its receiver, and Kennedy & Co. by their protege. Hence it was deemed absolutely necessary at the outset that the receiver's good-will should be conciliated, his co-operation assured, and his zeal stimulated.

Mr. Kittson and Mr. Hill were aware of those characteristics of Mr. Farley which he has himself made so prominent in his testimony in this suit—his self-will, his vanity, his obstinacy and his greed, and the associates accordingly caused a letter to be written to him by Mr. Kennedy, on April 4, 1878, which would not have needed to be written, and would not have been written, had plaintiff been an associate with Messrs. Kittson and Hill, or supposed to be such by them or by Mr. Kennedy. And this letter is itself a refutation of plaintiff's claim that Mr. Kennedy had been informed of his interest by his letter of Feb. 22, 1878, (Defts.' Ex. 72, p. 1009,) which, as already pointed out, conveyed no such information. Mr. Kennedy writes, (Defts.' Ex. 56, p. 998:)

"I presume you have seen Messrs. Kittson and Hill since their return to St. Paul, and learned from them how matters now stand between them and the Dutch committee. They are now the virtual owners of the property, and, with their friends in Canada, must go on and complete it as early as possible; and as this is quite as much for the interest of the Dutch bondholders, whom we continue to represent, as for Kittson and Hill and their associates, *we hope you will do everything in your power to aid them.* Mr. Stephen was here this week, and told me that both Kittson & Hill had spoken of you in the very highest terms, and showed the most kindly feeling towards you, and that he and they *wanted you to*

remain and aid them in completing the lines this year, and intimated very plainly that they both could and would make it worth your while to do so. They have no idea of superseding you, but mean you to remain in full charge and with full power and authority, only desiring that you should work in harmony with them, which I assured him you would do, so long as you were not asked or expected to do something you ought not to do, and that he assured me you never would be.

"They wish to press on and complete the entire lines to St. Vincent and Fergus Falls at the earliest possible moment, and their intention is to raise the funds for doing so through the medium of receiver's certificates @ 8 pr. ct. You will require to get a modified order from Judge Dillon to do this, which he will no doubt grant you, and I think that this is the best and indeed the only way to do it in present circumstances."

Mr Kennedy goes on to state advice he had given Mr. Stephen about the associates keeping their own counsel, and not allowing statements to be made in the newspapers, etc., adding, "and if they give you an opportunity, I wish you would give them the same advice."

On March 9, 1878, Mr. Kennedy also wrote, (in a letter introduced by plaintiff:)

"Please aid Kittson and Hill in any way you can, as they and their friends are now really the owners of the property, and as soon as some details are completed we will leave them to say what shall and what shall not be done." (Plff.'s Ex. 163, p. 318.)

The foregoing assurances, etc., were written at the instance of the associates, and in accordance with their suggestions made at the time of the proposal in January, and repeated in March. (Hill, 643 4, Q. 430-3; Stephen, 1241-3, Q. 103-109; Kennedy, 1595-6, Q. 10; 1624-6, C. Q. 78-80; 1629, C. Q. 90 92.) And Mr. Stephen says (1243, Q. 109,) that he meant, after the foreclosures, "to give him what the Dutchmen would call a 'bonification.'"

If plaintiff had been an associate, Messrs. Kittson and Hill and Mr. Stephen would not have thought it necessary to labor with him to act in the common interest; still less would they have employed the mediation of Mr. Kennedy—a stranger to the enterprise. But regarding him simply as receiver and general manager—an official who might have doubts as to the effects of the recent bargain on the

security of his own position, and whom they wished to conciliate,—they would naturally resort to the man who made him general manager, and at whose instance he had been made receiver.

This letter told Mr. Farley in language not to be mistaken that neither Mr. Kennedy nor Mr. Stephen nor yet Mr. Kittson nor Mr. Hill considered him interested in the bond purchase the four associates had just made, or in the enterprise they were then pursuing. The language of Messrs. Kittson and Hill, as reported by Mr. Kennedy, is wholly inconsistent with his being regarded as an associate. "They showed the most kindly feelings toward you, and wanted you to remain and aid them in completing the lines this year, and intimated very plainly that they both could and would make it worth your while to do so. They have no idea of superseding you," etc.

If plaintiff was or thought he was interested with Messrs. Kittson and Hill under his alleged agreement or under any agreement, would he not have gone at once to his "associates" for an explanation of this letter? It was an essential term of the agreement—without which Mr. Kittson, at least, would not have gone into the enterprise—that plaintiff should continue in charge of the property. Wouldn't he have thought, and wouldn't he have said to them, "what do you mean by saying such things to Mr. Kennedy and having him write them to me? Telling me you do not mean to supersede me! That you want me to remain and 'you will make it worth my while to do so!'" Plaintiff says he then considered that Mr. Kennedy was fully informed of his interest. And he must have considered that however Messrs. Kittson and Hill might have felt themselves bound to conceal his interest from Mr. Kennedy, the latter was under no obligation nor under any instructions to conceal from them what he had learned from plaintiff. What could Mr. Kennedy mean by receiving and reporting to plaintiff such statements of Mr. Kittson and Mr. Hill? If ever a letter demanded an explanation from the man who wrote it and from the men whose language it reported, this letter demanded one. And if plaintiff considered himself an associate with Messrs. Hill and Kittson, and especially if he considered that he had informed Mr. Kennedy of that fact, he would not have let a day pass without writing Mr. Kennedy for an explanation, and personally demanding of Messrs.

Kittson and Hill what they meant by language that was in effect an assertion that he was not interested with them; that he had no agreement with them; that he was one whom they regarded merely as receiver, whose co-operation they desired, and were willing to make it worth his while to give it. But he was silent—and he was silent because and only because he had no interest and did not dream that he had an interest. And he doubtless welcomed the letter as assuring him of undisturbed possession of both his offices, and that he would not be forgotten by the associates when they should come into their possessions.

After this letter, and in the same month of April, plaintiff, being in New York, in the course of a conversation with Mr. Kennedy in his office, stated to him that he had once been offered a small interest with Kittson and Hill, and desired Mr. Kennedy's opinion as to the probable outcome of the venture; remarking that it was a pretty big enterprise, and that while some of the bonds were cheap, others were too dear, and indicating an unwillingness to incur any risk. (Plaintiff, in this, doubtless had in mind Mr. Kittson's "chaff" in the previous January, already discussed.) He said he had not taken the offer, but thought he could still get what had been offered. Mr. Kennedy advised him to have nothing to do with it, and plaintiff said he guessed he would leave it alone. (Kennedy, 1597, Q. 12.) Plaintiff, it is true, called in rebuttal, denies this statement of Mr. Kennedy, (1669-1670, Q. 16-18;) but it is a distinguishing feature of his case that on all material points he is squarely in conflict with all the contemporaneous documents and with every credible witness. Nobody agrees with him but Fisher.

In accordance with Mr. Kennedy's request, the receiver caused his attorney, Mr. Heard, to prepare and verify a petition to the circuit court for authority to go on and complete the St. Vincent extension, and to issue debentures for that purpose. (Defts.' Ex. 159, p. 1522.) Upon this petition an order to show cause was made April 8, 1878, (Defts.' Ex. 159, p. 1557,) returnable April 18th, at Jefferson City, Mo. After a hearing, Judge Dillon, on April 26th, made an order appointing Messrs. John B. Henderson and T. C. Reynolds a commission to inquire and report on ten matters specially submitted to them, the second being: "*the*

names of the owners of the bonds under said mortgage, and the number and amount held by each owner or representative of each owner." (Plff.'s Ex. 202, p. 408.)

This order, made on Mr. Farley's application, called upon him to disclose what interest, if any, he had with Messrs. Kittson and Hill in the bonds purchased by the associates. The question would not have been more plainly put to him, nor would the duty of disclosure been more clear, if the court had said to him, in so many words: "Mr. Farley, have you any interest with these gentlemen?" He made no disclosure then or at any time.

Messrs. Henderson and Reynolds made inquiry and report. The separate report of Mr. Reynolds is Plff.'s Ex. 203, pp. 410-424, the ownership of the bonds and the interest of the four associates under their contract of March 13, 1878, with the Dutch committee, being stated on pages 413-5. Mr. Henderson's separate report is Plff.'s Ex. 204, pp. 424-433. Their joint report is Plff.'s Ex. 205, p. 433. Accompanying the joint report is the draft of a proposed order, which is Defts.' Ex. 25, pp. 923-932.

The associates having agreed with the Dutch committee to build the St. Vincent extension lines, and it being necessary, to save a forfeiture, to complete to Sauk Centre, by Aug. 1, 1878, and to Alexandria by Dec. 1, 1878, and their designs upon the Pembina branch, then in course of construction, requiring them to build to St. Vincent the same year, to make a through line to Winnipeg, many circumstances combined to render them desirous that this construction should be done through contract to be made by the receiver with themselves. Time was so all-important, and the loss that might result to them from any default or delay of the receiver or of any other persons to whom he might let the contract might be so enormous and far beyond any satisfaction that could in any case be recovered from such contractor and receiver, that such a mode of building the road seemed absolutely necessary to their own safety. And this view was acceded to by the commission in so far that they inserted in their proposed order, in par. IX, the following:

"Said receiver is hereby authorized if, in his opinion, the same shall be for the best interests of all parties concerned, to contract

the building of said lines of railroad or of any part of either of them, with any person or persons, at the lowest figure he can obtain therefor from sufficiently responsible parties, making payment to such contractor or contractors in debentures at par"—payment to be made on completion of each ten-mile section. (Defts.' Ex. 25, p. 930.)

Mr. Hill saw the reports and proposed order at Chicago, before they were presented to the court. (Hill, 646, Q. 436–7.)

The reports having been presented, Mr. Hill, accompanied by his counsel, Mr. Young, attended before Judge Dillon at Des Moines, as did also Mr. Farley. The reports were handed to counsel, who examined them with Mr. Hill, and the matter was then gone over with the court. The plan of building the lines by means of a contract with the associates seemed to be as advantageous to the court and the outstanding bondholders as to the associates, as it afforded the strongest guaranty that the lines would be built in season to save the land grant. The court was strongly influenced by two considerations, viz.: (1) that the *fiasco* of 1873 should not be repeated, and hence that no debentures should be issued until the entire lines were built; and (2) that the security of the outstanding bondholders should be impaired to as small an extent as was possible consistent with the need of completing the work, and therefore the amount of the debentures must be kept as low as possible. He was, however, of opinion that the mode proposed by Mr. Hill and his counsel was the better way—as, of course it was—but subject to the condition (and in this he was inflexible) that no debentures should be issued until all the work was done.

And here Mr. Farley, who, in 1877, had built the Breckenridge-Barnes link at a marvellously low cost, (and so badly that it had to be rebuilt the next year,) and flushed with pride in the achievement, and filled with the notion that nowhere was there such a railroad builder or operator as himself, and wholly disregarding the wishes and interests of the associates, "interrupted and said that he could build the road cheaper than anybody in the world, and told the Judge that he thought entirely the better way would be to leave the matter of the construction with him." (Hill, 646-7, Q. 442.) The effect of this was to set the mind of the court against the proposal of the associates; and while he would not decide to

give *any order at all*, he did say that he would not allow the issuance of debentures till the road was completed.

Mr. Hill, not feeling at liberty to accept such an order, (and there were strong reasons in favor of the policy of letting the court alone, letting the court's interference and plaintiff's receivership end in a forfeiture of the lines they had undertaken to build, and then building them under a re-grant after forfeiture as provided by the acts of 1877 and 1878,) and in order that, if possible, plaintiff might be made to undo the mischief he had done, took him to New York, and *put him into the hands of Mr. Kennedy*, with the result that he was induced to send a telegram to Judge Dillon on May 25th, recommending a contract with responsible parties for the building to Alexandria and to Pembina at $10,000 per mile in receiver's debentures, to be issued on completion of ten-mile sections. (Hill, 647, Q. 443; Defts.' Ex. 48, p. 995.)

But the impression made by plaintiff on the mind of the court was not removed by the telegram. Mr. Hill returned to Des Moines, went thence with his counsel, Mr. Young, to Davenport, where another interview was had with Judge Dillon, at which plaintiff was present and took part. At that interview, on May 31, 1878, the order of that date was dictated, section by section, by Judge Dillon to Mr. Hill's counsel, and every clause was fully discussed, and the provision in the 9th paragraph in regard to contracts was procured to be inserted, but without aid from plaintiff. (Defts.' Ex. 160, pp. 1559, 1562.)

The order contains a recital that Messrs. Stephen, Smith, Kittson and Hill "represent and show to the court that *they* are the equitable owners of $11,400,000 of the $15,000,000 issue of bonds, as shown and set forth in an agreement between them, as parties of the first part, and Chemet & Weetjen," etc.,—being the agreement of March 13, 1878, a copy of which had been furnished to the court with the report of Mr. Reynolds. (1559, par. II.) Plaintiff heard that as it was read aloud, and was silent. In effect he joined in the representation, which he says he knew was false.

When the order had been (as was supposed) completed, it was left with Mr. Young to make a fair copy. Late in the afternoon, in the copy thus made, Judge Dillon added new conditions to the

order, and then signed it, saying that if the associates failed to carry it out, it would destroy them and ruin him; and then turned to his receiver and said: "Mr. Farley, remember, in this matter you are *my* man, and you must see to it that this order in all respects is carried out." (Hill, 647-651. Q. 443-461.) Plaintiff will not deny this, but falls back on a want of recollection. (165-9, C. Q. 257-296.)

And plaintiff did not tell the judge that he was secretly an associate with the men whom he was thus charged to hold to strict account. He did not confess that he was *their* "man" and not the man of the court. And this is the man who says: "I would not state an untruth, sir, if I knew it, for the state of Iowa—if I know it—Minnesota throwed in." (1363, *Q. 55.)

The order being made, it was still thought that, under the discretion given by par. IX. to the receiver, *a contract might be let*, and it was also deemed desirable that, if it could be done, the line north of Glyndon should be leased to the Red River & Manitoba Co., which, under their agreement with the committee, was controlled by the associates. This last matter they had also considered the previous winter. (Defts.' Ex. 20, p. 919.) And, to effect this, Mr. Kittson and Mr. Hill do—what? Do they suggest to their "associate" the wishes of themselves and the others? Nothing of the kind. They wrote to Mr. Stephen, who *was* their associate, on June 7th, as follows:

"We think Mr. Farley is so much determined to make a large showing of net earnings that of his own choice he will not recommend a lease to the court; but if Mr. Kennedy will advise him to do so, and at the same time you write us urging it, we think it can be done." (Defts.' Ex. 128, pp. 1305-6.)

On receipt of this letter, Mr. Stephen, on June 10th, telegraphs Mr. Kennedy, asking him to wire plaintiff to give them the contract to build the road. (Defts.' Ex 102, p. 1024.) And on the same day Messrs. Kennedy & Co. telegraph plaintiff, asking him to give the contract, (Defts.' Ex. 50, p. 996,) and Mr. Kennedy writes, asking him to make the contract and the lease, adding: "but in all these matters, while we would like you to meet their views as far as you properly can, you must do just as you think best in regard to

all of them." (Defts.' Ex. 57, pp. 999-1000.) Sir George Stephen also testifies that this letter was written at his instance. (1243, Q. 110.)

On June 13th plaintiff writes Messrs. Kennedy & Co. in reply to the telegram, insisting that:

"Under any and all circumstances it is expected that I should superintend the work of construction, and I would like to hear from you instructions as to whom I shall draw upon for the amount of money necessary to pay for ties, labor, &c.

"You will pardon me for the suggestion, but you are aware that Mr. Kittson is an old gentleman and does not intend to trouble his head much about this railroad matter. J. J. Hill is all right, but a very sanguine man. Messrs. Stephens and Smith are a good ways off, and I do not feel at liberty to annoy them on the subject, and will have to rely wholly upon you to financier this matter.

"I want to see this work done with the smallest amount of cash possible, but cannot afford to get into any trouble in making contracts without being able to meet them." (Defts.' Ex. 94, p. 1019.)

A press copy of this letter was introduced by plaintiff in rebuttal, on October 12, 1888, (Ex. 226, pp. 1683, 1717,) but not until defendants, in April, 1888, *had already introduced* the original. (Defts.' Ex. 94, p. 1019.)

Plaintiff, in making out his case, had testified that as soon as Mr. Kittson told him he could procure, through Messrs. Smith and Stephen, the $3,000,000 or $4,000,000 needed to buy the bonds for cash, he had full confidence in the statement, and assured Mr. Carp that Mr. Kittson could get the money, and by these assurances prevailed on Mr. Carp to listen to plans which Mr. Barnes "hooted at." But when this letter was written, the four associates had formally agreed with the Dutch committee to build these sections of road. They had engaged with the court to furnish the money to do it. They had put themselves in a position where a failure to furnish the money would ruin them. They had given evidence of their ability, as well as of their confidence, by paying the Dutch committee $280,000 for their expenses, a sum that would be wholly lost if their enterprise should fail. They had made arrangements with the Cambria Co. for all the iron needed for the lines, payment to be made in receiver's debentures, they guaranteeing payment of principal and interest. (Hill, 652-3, Q. 469-473.)

The *cash* expenditures required to be made by plaintiff would not, at the outside, exceed $500,000. And yet at this time, after he had been, as he says, for two years an associate with these gentlemen, he had no confidence that they would furnish this comparatively small sum, which they had pledged themselves to furnish, and which it would be ruinous to them not ~~not~~ to furnish. He would not incur the least liability on the faith of those pledges. Nor does he state *to them* his distrust, or give them an opportunity to allay it. He writes to J. S. Kennedy & Co., requiring from them an assurance that his own associates will do the things they have agreed to do, and upon which the success or failure of the whole enterprise depends. Is this the natural conduct of an "associate" in such an enterprise? Or is it the conduct of one having no interest, being a mere receiver, looking merely to his own protection, and, moreover, with little confidence in the ability of Messrs. Stephen, Smith, Kittson and Hill to carry out their undertaking?

In his letter just considered, plaintiff expresses a willingness, under certain conditions, to make a contract. In J. S. Kennedy & Co.'s reply, (June 18, 1878,) they inform him that "Mr. Stephen intends to build the road and pay for it, and we will do all in our power to assist and bring the matter to a favorable conclusion, and keep you clear of all trouble or complications." And they say: "We shall advise you in good time regarding the funds you may need. If you let the contract, it would facilitate that part of the business." (Defts.' Ex. 49, pp. 995-6.) Still Mr. Farley did not let the contract. About this time he was more occupied in trying to find out from J. S. Kennedy & Co what to do with his bonds and "Comitty's certificates."

Early in July, 1878, Mr. Hill, with his counsel, Mr. Young, went to New York, and a conference was had with Messrs. J. S. Kennedy & Co., and another with Mr. Jay Cooke, representing the Northern Pac. Co., which at that time was planning for the control or destruction of the line north of Glyndon, and for building a road parallel with the Branch line. (Hill, 639, Q. 411-2; Stephen, 1243-4, Q. 111-113; Defts.' Ex. 58, p. 1000.) At that meeting the proposed contract and lease were discussed, and Mr. Kennedy was induced to put a further pressure on plaintiff, which he did in a

"private" letter of July 10th (Defts.' Ex. 58, p. 1000,) which Mr. Stephen says (1244, Q. 114) was written at his instance. In that letter Mr. Kennedy writes:

"Mr. Stephen and his associates are anxious that a lease of the Extension roads should be made to the Red River & Manitoba R. R. Co., and they have pointed out in what ways this would prove beneficial alike to the Extension lines and to themselves. They are also desirous of taking a contract for the completion of the Extension lines, taking their pay in receiver's debentures, which I understand Judge Dillon was at one time desirous should be done. I have talked over those matters very fully with them, and I think that, if you were here, arrangements could be made to meet their wishes that would be equitable to all parties interested, and that would, I think, meet the approval of the court. I find it impossible, however, in the compass of a letter, to state to you in an intelligent manner their views and wishes and my own. I have, however, informed them that I was quite sure that you would meet their views as far as you possibly could, in all respects, to the extent that the court would give its approval. Mr. Hill is doubtless with you by this time, and has informed or will inform you of the discussions we had here on these subjects, and I hope you will be able to meet his views."

And in the same letter, they set plaintiff's fears as to the money question at rest:

"You may keep your mind perfectly easy regarding the settlements for rails and joints with the Cambria Iron Co., and also regarding the funds for that portion of the work that must be paid for in cash; for this, as mentioned in Mr. Barnes' letter, you may draw on us from time to time as may be necessary to do so, advising us by telegram when making drafts."

Mr. Barnes' letter of Monday, (July 8th,) twice referred to in this letter of Mr. Kennedy, was obtained by defendants under a notice to produce (555, 557, 1423,) and is Defts.' Ex. 146. p. 1495.

In this letter Mr. Barnes, for his firm, again urges the contract, assures plaintiff in respect to money matters, and authorizes him to draw on Messrs. J. S. Kennedy & Co.

The contract and lease, however, were not made, while the necessity for the former became every day more urgent. Plaintiff made slow progress in completing the 9 miles from Melrose to Sauk Centre, on which there was little to be done, except to repair a roadbed made by De Graff & Co., and which merely required a little

trimming; to replace a few of the piles that had already been driven by De Graff & Co.; to lay the ties and iron, (which Mr. Hill caused to be provided in ample season;) and to build a few small bridges. Mr. Hill was alarmed lest plaintiff's dilatory proceedings should leave this piece of road unfinished by August 1st, when, by force of the statute, all the uncompleted portions of the St. Vincent Extension, with the land grant, would be lost. In fact, the line reached Sauk Centre only on July 31st. (Hill, 651-2, Q. 463-468.)

Plaintiff, however, during this period, had ample time to correspond with Messrs. Kennedy & Co. in regard to a sale of his Branch line certificates, his desire to sell being quickened by the threats of the Northern Pacific Co. to build a parallel line. (See his letters collected in Table II, hereto prefixed.) And it was for this reason, perhaps, that he overlooked Mr. Kennedy's letter of July 10th, urging the lease and contract.

On July 22d Mr. Hill wrote to Mr. Stephen saying he had induced plaintiff to go with him to Sauk Centre, and had pointed out the trouble, and that steps had been taken to remedy it, mentioning his fears for the completion of the road in time, and adding:

"I have had several talks with Mr. Farley in regard to contracts, lease, etc., and to-day he showed me a letter from J. S. K., dated the 10th inst., which he had overlooked. This letter was right to the point," etc. (Defts.' Ex. 130, p. 1308.)

On July 25th Mr. Stephen wrote to J. S. Kennedy & Co., enclosing a copy of Mr. Hill's letter of the 22d, calling attention to Mr. Hill's fears about the completion of the line by Aug. 1st, and adding:

"I hope that there is now no doubt about that, but would suggest that on receipt of this you wire Mr. Farley, impressing him with the importance of the matter, and that there must be no mistake about its completion by 31st.

"You will also note that your letter to Mr. Farley about contracts and lease had been overlooked by him. This is unfortunate. It seems to me that without support from us down east Mr. Hill cannot do much with Mr. Farley." (Defts.' Ex. 103, pp. 1024-5; Ex. 104, (copy of Ex. 130,) p. 1025.)

On July 23d Mr. Hill again wrote to Mr. Stephen.

He repeats a telegram of the same date: "Receiver promises

contract and lease will be satisfactorily settled. Am pushing as fast as I dare," and adds:

"I have had the matter ready to close for two days, but have not been able to get Mr. Farley long enough to fix the details. One reason is that he is very busy, and does his work slowly, and the other is that he wrote Judge Dillon a letter before he went to N. Y. about the order, to say that he could build and equip the road for $8,000 per mile, and now he is trying to justify a contract for $10,000 per mile. I feel quite sure that he will do what we want done, but as we want done quickly he hesitates in regard to what is the best way; and as he is the receiver, I dare not urge the matter too strongly.

"To-day we have telegrams from the end of the track that show very poor progress indeed, and to prevent any accident about our getting to Sauk Centre by Aug. 1st, I have got Mr. Farley to go up with me to-night, and to-morrow morning take such steps right on the ground as will insure the road finished to Sauk Centre in time.

"This course is absolutely necessary to save any question of a forfeiture under the state laws, and still I have trouble to get a sufficient force to insure the work.

"I hope you will come to Minnesota shortly after Aug. 1st, and remain a few days, as there are many things to consider that I cannot write about and give you the information necessary; and again your personal attention and request will do much towards settling some things that should be settled.

"Situated as we are with trustees and receiver, I do not think it safe to push too hard, and you can easily see how I might make trouble by too much advice. I can assure you I wish we had the contract for the work of building the road, and were actually building ourselves, as I am sure that it would be done faster, and for less money. Mr. Farley is honest, and tries hard, but he has not succeeded very well so far; in fact I am disappointed; but when we get to Sauk Centre, which I will see is done in time, we can take stock, and count cost, &c., and I have good men ready to do the work for what it is worth, if it costs too much." (Defts.' Ex. 106, p. 1027.) On receipt of this letter, Mr. Stephen wrote J. S. Kennedy & Co., on July 26th, enclosing a copy of it. (Defts.' Ex. 105, p. 1026.) He, also, on the same day, wrote to Mr. Hill. (Defts.' Ex. 27, p. 934.)

Thereupon Mr. Kennedy wrote plaintiff, on July 27th, that "it is really cutting matters altogether too fine" to run so close to a forfeiture, and "I do hope you will not cut matters quite so fine

again." And he gives reasons for which he urges plaintiff, "most strenuously," to contract the work, and says that Mr. Stephen, who will soon be in St. Paul, "will explain to you more fully than I can do now the importance to him and his associates of the speedy completion of the work; but I trust you will have satisfactory arrangements made with Mr. Hill before Mr. Stephen arrives." (Defts.' Ex. 60, pp. 1002-3.)

On July 30th, Mr. Stephen wrote Mr. Hill, saying he would soon visit St. Paul, and enclosing a "memo." of things he expected then to occupy him, and adding:

"This memo. has been settled on between Mr. Kennedy and myself, so Mr. Farley will see that Mr. K. is *with us* in all these matters. It might be as well for you to show this memo. to Mr. Farley, but as to that use your own discretion." (Defts.' Ex. 28, p. 935.)

This correspondence very clearly shows that Mr. Hill and Mr. Stephen did not regard plaintiff as an associate, or otherwise than as receiver, and that Mr. Kennedy did not regard him as interested in the enterprise. And it shows also that, whether rightly or wrongly, Mr. Stephen and Mr. Hill considered that plaintiff, as receiver, was anything but zealous or efficient in the work the court had set him to do, and on which their own fortunes depended, and that he failed to appreciate its importance.

And on Mr. Stephen's visit (in early August, 1878,) the plaintiff, in conversation with him, clearly defined his own attitude toward the enterprise:

"Mr. Farley, in the course of a conversation about the extension and other work, in the most friendly way told me that I was making a great mistake in having anything to do with building a railway to the boundary; that he had been operating these lines a number of years, and he knew that there would be no use for a railway to the international boundary for the next twenty years; but that his duty, as an officer of the court, was to spend the money if I provided it; 'but I tell you,' he said, 'as a friend, that you are making a great mistake, that the money will be thrown away,' or 'lost,' or words to that effect." (Stephen, 1248, Q. 135; 1264, C. Q. 5.)

Mr. Stephen's reply was: "We are committed to it now, and must go through with it." (Id.)

Certain letters and a "memo," shown to Mr. Stephen on his cross-examination, were afterwards introduced by plaintiff as part of his evidence in rebuttal. (Plff.'s Ex. 216-219, pp. 1709-1711.) But neither these nor the other letters of Mr. Stephen, nor those of Kennedy & Co. introduced at the same time, in any way weaken the force of Sir Geo. Stephen's testimony, nor of the previous correspondence. Mr. Stephen, in the letters, is very courteous. He is complimentary, and thanks plaintiff for his attentions, but is less effusive in his compliments and thanks than plaintiff's friend Carp used to be. And he not only thanks plaintiff for his arrangements for the comfort of himself and his party, but adds: "To our two friends who did their duty so well in taking charge of us, pray thank them for me, as I did not see them before I left; and if they will accept the inclosed trifle as showing my appreciation of their services on that occasion, I shall be very glad." (Plff.'s Ex. 217, p. 1709.) Mr. Stephen thanks the receiver and general manager and the train-men, giving the latter a *douceur* he could hardly offer to the former.

The contract was at last obtained, but in the meantime work went on slowly and Mr. Hill writes to Mr. Stephen, Mr. Stephen to Mr. Kennedy, and Mr. Kennedy to plaintiff—a roundabout way for Mr. Hill to make known his wishes to his "associate." (See Deft.'s Ex. 107, p. 1028; Ex. 106, p. 1027; Ex. 29, p. 935; Ex. 109, p. 1030.)

In the course of this summer certain disagreements with the Northern Pacific Co. as to rates and interchange of traffic were settled by arbitrators, chosen by the general managers of the two roads.

In November the basis of a settlement of all differences was agreed on, and a "protocol" made, by which the building of a road parallel with the Branch line was averted, opposition to the foreclosure of the extension mortgage was withdrawn, and *the stock of the St. Paul & Pacific Co.*, controlled by the Northern Pacific Co., *was made over to the associates*, leaving them only the First Div. Co. and the Litchfields to deal with (Hill, 641-2, Q. 421-424.) In the making of this settlement, plaintiff was not consulted at all as to any matters of *policy*. As general manager of the First

Div. Co., he was doubtless called on for information as to *matters of detail* by Mr. Kennedy and his co-trustees, who, as such, took part in the settlement, and as receiver he of course controlled the operation of the extensions for the time being. (Hill, C41-3, Q. 421-9; Stephen, 1251, Q. 153-7.)

In November, 1878, Mr. Kennedy being in St. Paul, (at the time of making the "protocol" with the Northern Pacific Co.,) plaintiff spoke to him of getting an additional assistant, and suggested that the associates had better select a good man to act as superintendent under him, and to remain with them after they came into possession. Mr. Kennedy asked him if Fisher would not do, and he said no; that when he left, Fisher would probably return to Dubuque *with him*. Mr. Kennedy communicated plaintiff's wishes to the associates, and Mr. E. B. Wakeman was chosen by Mr. Hill and approved by the associates for the position. (Stephen 1257-8, Q. 187-190; Kennedy, 1598, Q. 13.)

On Nov. 2, 1878, plaintiff writes to Mr. Kennedy: "I look forward to an early day when I must be relieved from the strain of nerve and brain. I assure you I cannot endure it much longer." (Defts.' Ex. 95, p. 1020.)

And here the question presents itself: Why did plaintiff make this intimation to Mr. Kennedy and not to Messrs. Kittson and Hill? He says it was part of the consideration to be furnished by him that he should operate the lines after their acquisition; that without this, Mr. Kittson, at least, would not undertake the enterprise, for it would be folly to do so unless they could have Mr. Farley to manage the property after they got it. When he thus proposed to deprive his associates of his invaluable aid, of that which he was bound by the alleged agreement to render, and without which the property, even if acquired, would be of but little value to them, why did he not go to *them* and make known his determination, and request them to take the necessary steps, to fill his place so far as it could be filled by any but himself?

If he had the agreement with them which he alleges, this is certainly what he would have done. But just as the associates make known to him their plans and wishes through Mr. Kennedy, so he

chooses the same medium of communication with them. Offering them no excuse for his breach of the agreement, no solace for their blighted expectations, he goes to Mr Kennedy, who testifies that he said—

"He found his duties becoming rather onerous and burdensome, and that he was getting to be too old to be going out on the road in the winter time, to look after matters in case of need; and he said that, as it was evident the property would sooner or later fall into the hands of Mr. Stephen and his associates, he thought they had better select a good man to act as superintendent under him, and who would be likely to remain with them after they came into possession of the property; *and he requested me to speak to them upon the subject, which I did.*" (1598.)

Was there ever such an association as this, where no communication is ever held between the leader and his followers except through the medium of an outsider?

Plaintiff's subsequent course in regard to Mr. Wakeman, and his complaints when he found that "My time and claims on the St. Paul & Pacific is short," go to show that he was not wholly sincere in his expression of a desire to quit. He may have expected that the associates would regard him, as he seems to have regarded himself, as indispensable to the management of the roads, and that his suggestion of a retirement would be met with solicitations to remain, and an offer of substantial inducements for doing so. In this he was disappointed. He was taken at his word, and to this day he seems never to have forgiven Mr. Wakeman for receiving the appointment.

The associates were the more desirous of Mr. Wakeman's appointment, because of the dissatisfaction they felt with plaintiff's and Fisher's management of the property. (Defts.' Ex 32, p. 938; Ex. 33, p. 940; Ex. 131, p. 1309; Ex. 132, p. 1311; Ex. 34, p. 940; Ex. 35, p. 941.)

Mr. Hill accordingly spoke to plaintiff about Wakeman. In a letter to Mr. Stephen of December 29, 1878, (Defts.' Ex. 131, p. 1309,) he shows why a change in superintendence is necessary, because of frequent accidents, trains derailed, want of system and discipline. He says: "I have had some talk with Mr. Farley about Wakeman, and depend upon it he will do nothing. He said we might get Mr.

Wakeman, as a train despatcher." The whole of this letter should be read as showing how plaintiff treated Mr. Hill, and how Mr. Hill regarded plaintiff.

On Dec. 29th, Mr. Hill again writes Mr. Stephen, (Defts.' Ex. 132, p. 1311,) acknowledging Mr. Stephen's letter of Dec. 24th, (Defts.' Ex. 31, p. 938,) with its enclosure, (Defts.' Ex. 32, p. 938, —being copy of letter of Mr. Stephen to Mr. Kennedy.) This letter also throws much light on the relations between plaintiff and the associates. Mr. Stephen, in the letter to Mr. Kennedy, (Defts.' Ex. 32, p. 939,) had written: "It would be a capital thing if you could possibly coax the old man to send for Wakeman at once," etc. And as to this suggestion, Mr. Hill writes:

"I think, if pressed, Mr. F. would bring Wakeman here, and try to hold him responsible for results for which he had no control, and in that force an issue with him, when we would be obliged to sustain one or the other, *with an almost certainty that Mr. Wakeman would be right, and Mr. Farley would be receiver.*" (Defts.' Ex. 132, p. 1311.)

Mr. Kennedy did not act on Mr. Stephen's letter, not thinking it policy for the associates, while the debentures matter was not yet settled, "to risk any disagreement with Mr. Farley." (Defts.' Ex. 33, p. 940.) And see Mr. Stephen's letter to Mr. Hill, Jan. 3, 1879, Defts.' Ex. 34, pp. 940-1. Nor was it until the following March, after they had bought the First Div. stock for $500,000, and after repeated efforts by Mr. Kennedy, that Mr. Wakeman's appointment could be secured, and then only as superintendent of the First Div. lines, in place of Fisher, the latter being still retained by plaintiff as assistant to the receiver.

The First Div. foreclosure decrees being entered, "We thought we were reasonably safe in insisting upon the change, and we did insist that the change should be made," and, with Mr. Kennedy's aid, they secured it. (Hill, pp. 662-3, Q. 506-509; Kennedy, pp. 1600-1, Q. 13.)

Plaintiff in rebuttal, says (1672, Q. 25:) "Mr. Wakeman was rather forced upon me, and I knew him to be incompetent. He never held any position of that kind before. I didn't want the stigma of appointing such a man. I had a reputation then that I thought a little something of, and it was by great solicitations from

Mr. Stephen, and possibly from Mr. Kennedy, that I did make the appointment." But Mr. Hill says that Mr. Wakeman "had been very highly recommended to us, and we thought well of him." And as to Mr. Farley's knowing him "to be incompetent," Mr. Wakeman, when the testimony was taken, in 1888, was still the assistant general superintendent of the then nearly 3,000 miles of the Manitoba system. (Hill, 661-2, Q. 505-7.)

During the winter of 1878-9, plaintiff showed his ignorance of the purposes of the associates by allowing Fisher to make a through traffic arrangement with the firm of contractors then operating the Pembina branch, whom the associates wished to force into turning that road over to the Canadian government, so that they could themselves obtain control of it. To hasten its construction, Mr. Hill had procured Mr. Willis to take an interest in the contract. The road having been finished a year within the contract limit, the original contractors with the Canadian government claimed the right to hold possession and operate it until that limit, and they denied any right of Mr. Willis, on the ground that, though interested with them in the construction, he was not a party to the contract with the government. In this state of things plaintiff or Fisher, with his sanction, made a through traffic arrangement with the contractors. (Hill, 660-1, Q. 501-4; Stephen, 1259, Q. 191-3.) Mr. Hill seems to have learned of plaintiff's action while in Montreal, as Mr. Stephen writes on Feb. 12, 1879, to J. S. Kennedy & Co. (Defts.' Ex. 114, pp. 1037-8.)

This letter of Mr. Stephen (written after the purchase of the First Div. Stock from the Litchfields) shows several other grounds on which the associates were dissatisfied with plaintiff's action, and shows that, as in former instances, they resorted to Kennedy & Co. to help them with their "associate." As a result of this letter to them, J. S. Kennedy & Co. wrote to plaintiff, on Feb. 15, 1879, the letter which is Plff.'s Ex. 167, p. 320. And on Feby. 17, 1879, Mr. Barnes writes to Mr. Hill:

"I wrote Farley a letter, in answer to his which you saw, which covers the case. Mr. Stephen has a copy of it. The gist of it was that as you owned practically all the interests in the property, both First Division and Extensions, nothing should be done by

him without full consultations and approval." (Defts.' Ex. 55, p. 997 The error in date of this is explained by Nichols, 962, Q. 32-34.) And Sir George Stephen also states in his deposition how the letter of Feb. 15, 1879, came to be written. (1258, Q. 190-1.)

Plaintiff and Fisher, in rebuttal, say that the objectionable arrangement originated with Mr. Hill, who was "very anxious to have it made," and Fisher says it was done between himself and Mr. Willis. (1655, Q. 6½; 1661, C. Q. 23-4.) In this he is contradicted by Mr. Willis, 1701-2, Q. 4,) who knew nothing about the through rate. (1702-3, C. Q. 1-6.) And see Alexander, (1704.)

It appears from Mr. Stephen's letter of Feb. 12, 1879, (Defts.' Ex. 114, pp. 1037-8,) that Mr. Hill first learned of the arrangement in Montreal. And the associates had no secrets from each other in matters affecting their common enterprise, and certainly Mr. Hill was not a man to remain in ignorance of the purposes of his associates—and that too when he was so largely concerned in devising and executing them. He was not so wanting in intelligence as not to see that any such arrangement would thwart their purpose of ousting the contractors and obtaining the road for themselves. And it is not conceivable that he should have advised an act which he knew was detrimental to the common interest.

And so late as March 22, 1879, the plaintiff, criticising a proposed sale of part of the First Div. property at St. Paul, does not address the associates, but writes to Kennedy & Co. (Plff's. Ex. 221, p. 1712.) From the foregoing evidence—most of it being letters written at the time—it appears very clearly that plaintiff did not regard himself as an associate and was not so regarded by either Mr. Hill or Mr. Stephen. It is an unheard of thing that associates in a common enterprise should uniformly and continuously resort to the influence of third persons over one of their own number as Mr. Hill and Mr. Stephen resorted to J. S. Kennedy & Co.; and their conduct, and that of the plaintiff and of J. S. Kennedy & Co., plainly shows that plaintiff regarded himself and was regarded by all the others simply as receiver and general manager—a stranger to the enterprise, but in an official position enabling him to aid or obstruct their plans, and hence to be conciliated and influenced by

Mr. Kennedy, as trustee, and by his firm, as agents for the Dutch committee.

And their conduct is entirely in keeping with their relations during the negotiations for the bonds when plaintiff applied, not to them, but to J. S. Kennedy & Co., for information as to their bargain and their plans.

The correspondence showing the views of the associates as to plaintiff's relation to their enterprise, and how they resorted to Kennedy & Co. to influence him, is collected in Table V, prefixed to the argument.

Mr. Farley's Own Private Bond Purchases.

The correspondence on this subject is collected in Table II, prefixed to this argument.

In the circuit court it was argued that these purchases were made after the offer to Carp in Feb'y, 1877, to buy the First Div. *lines*, and before the letter of May 26, 1877, which opened negotiations for purchase of the bonds, and therefore at a time when it was open to him and to Mr. Kittson or Mr. Hill to buy bonds on his own account. This can be so only if one of two things is true, viz., (1) that the alleged agreement was abrogated upon the offer being made to buy the lines, in which case we ask, where is the evidence of any *new* agreement? or (2) that there was nothing in the alleged agreement which precluded any party to it from buying bonds on his sole account, or on joint account with one only of the other two. And if the alleged agreement did not preclude plaintiff from buying, alone or jointly with his Dubuque friend, bonds and "Comitty's Certificates" to the amount of $50,000, without liability to account to Kittson and Hill, what was there in that agreement which precluded Kittson and Hill from buying, by themselves or jointly with Smith and Stephen, bonds to the amount of $25,000,000, without liability to account to plaintiff?

The fact of plaintiff's purchases was first brought out on his cross-examination. (169-176, C. Q. 297-355.) He says (172-3, C. Q. 318, 332-3) he has no books of account or letters or other means of refreshing his recollection "as to the character and extent

and dates" of his bond transactions, or "as to the disposition of these bonds." The defendants were, however, enabled to produce some of his own letters to Kennedy & Co. on these points, and also copies of letters of Kennedy & Co. to himself, the originals of which he refused to produce, although duly notified. (555, 557.) And it may be added that while plaintiff has introduced a great mass of correspondence between himself and Kennedy & Co., almost the only letters between them having any bearing on this case are those introduced by defendants—always excepting the letters of June 9, June 19, and Dec. 18, 1876, (introduced to show references to the Breckenridge-Barnes link, but which we proved to refer to the negotiation with Barnes in April, 1876,) and the letters which suggested and were meant to corroborate the fracas about the newspaper article, and the story (soon to be discussed) about Mr. Kittson asking plaintiff to go to New York to negotiate with Litchfield for the stock, which had already been bought by Mr. Stephen. And it is at least doubtful if these would have been brought forward had their true import been known. At any rate, all the letters showing plaintiff's ignorance of the negotiations, all showing his own bond speculations, were left to be discovered and introduced by defendants.

And these letters show that concurrently with each step taken by defendants to acquire the committee's holding, the plaintiff writes about a side speculation of his own. They negotiate with Barnes in April, 1876, and on June 3d he writes: "I would *again* say to you I think there is a big thing in Main Line 3 and 6 milion Bonds at their present Selling price." On August 16, 1876, Mr. Kittson telegraphed Barnes to learn if the committee will sell. Barnes wrote on the 17th to plaintiff a letter which he "Red to Friend Kittson," but would not produce, and on Aug. 23rd, plaintiff writes that Mr. Kittson's enterprise "might become a Canady Project, but that would be a mater of no moment to you or me if we could make some money." After the letter of May 26, and when plaintiff learned from Kennedy & Co.'s letter of June 27, 1877 (Plff's Ex. 132, p. 289.) that they were inclined to favor the negotiation, he buys certificates for $25,250 of the $1,200,000 Branch Line mortgage bonds, and $17,000 of the $6,000,000 Main Line bonds,—and may

have bought more. He says himself (169, C. Q. 299) that the certificates were bought "during the transaction in Holland," and (171, C. Q. 312) that his purchases "extended through the summer of 1877," and on March 9, 1878, he writes to Kennedy & Co., in the letter printed *supra*, p. 150, "During the summer past I bought on joint account with one of my Dubuque friends," the above mentioned certificates and bonds. And on July 26, 1878, he writes that the purchase was made "about one year ago." (Defts.' Ex. 67, p. 1007.) In the letter of May 26, 1877, the prices named for these classes of bonds were respectively 80 per cent. and 40 per cent. Negotiations proceeded, with changes of prices, some raised and some lowered, until in October they were finally fixed at 75 and 35 per cent. Plaintiff, on learning the prices, at once writes the letter of October 23, 1877, (*supra*, 148,) withdrawing an authorization he had given Carp through Knuppe for the certificates to "go in with sale" to the associates.

The negotiations began early in 1878 having resulted in a purchase, and plaintiff having learned, early in March, from Barnes' letters in answer to his inquiries, the prices and amount of bonds agreed on, he writes on March 9th, 1878, a letter printed, *supra*, p. 150, asking advice as to letting his holding "go in with the Dutch interest," at the prices offered. On June 18 and 28th he writes further on the same subject. Early in July, 1878, the Northern Pacific Co. assumed a hostile attitude, threatening to make a connection with St. Paul by paralleling the Branch line, and during that month, and while the associates were alarmed at his inactivity in building the 9 miles between Melrose and Sauk Centre, he found time for frequent letters to Kennedy & Co. on the subject of his speculation. At length Kennedy & Co., at his request, advance 60 per cent. on the Branch line certificates (Defts.' Ex. 68, 69, pp. 1007-8,) and soon afterwards they are sold. Who were the purchasers? Plaintiff said more than once that he did not know. (174, C. Q. 335; 175, C. Q. 351.) But at that time the associates were the only buyers of these certificates and bonds. There had never been any American market for them except at St. Paul, and that market the associates, aided by Mr. Upham, had broken up. And Kennedy & Co., in their letters,

plainly tell him, what he must have known without telling, that their customers are the associates.

In answer to his letter of June 18th, they write on the 22d: "Should you desire to sell the certificates, we believe *our friends* would give you as much for them as they would for the original bonds." (Defts.' Ex. 52, p. 997.) On July 10th, they write that his letter of June 28th, (Defts.' Ex. 64, p. 1005.) "has remained unanswered until we could have a talk with our Canadian friends. We are authorized to purchase the $1,200,000 issue at 75 per cent. flat." (Defts.' Ex. 51, p. 996.) If plaintiff did know that the sale was made to the associates, his testimony to the contrary is of course false. If he did not know, he exhibits ignorance not to be expected of an "associate," and, in the light of the above correspondence, shows a lack of ordinary intelligence.

According to his own story, plaintiff was working for a double profit out of the bonds—a joint profit with the associates from the results of the enterprise, and a private profit of his own by buying bonds to sell to the associates or to any one else. That good faith required that he should not buy on his own account, but only in the common interest, that he should not buy and then sell at a profit to his associates, is beyond question. He is in this dilemma: either he had no agreement which precluded his buying, on his own account, bonds in which the others should be entitled to no interest—in which case the others had the same right to buy on their own account or with Messrs. Smith and Stephen, and exclude him from any interest in the purchase; or, if the agreement did preclude each from buying on his own account, he did not live up to his agreement, and was as false to his associates as to the bondholders and to the court. It is not at all probable that any one engaged in so great an enterprise, promising so great a profit, as the acquisition of these railroads by means of a purchase of the bonds, would turn aside to engage in such speculations as plaintiff's, which had a direct tendency to injure the enterprise by enhancing the prices of the bonds, and this apart from any question of good faith.

The Dealings of the Associates with the Outstanding Bondholders and the Stockholders.

It was all along the plan to obtain in the first instance from the committee "a fair majority of each class of bonds, * * * expecting to make reasonable arrangements hereafter to get in the bonds not represented by your committee," to use the words of Messrs. Kittson and Hill, in their letter of July 31, 1877, to Johan Carp. (535.) It was considered that the possession of a majority would enable the associates to control prices, and thus get in the outstanding bonds at reduced prices. (Hill, 629-630, Q. 370-2.)

The only demand for bonds was for use in exchange for lands—a demand proceeding from St. Paul, at which place there was a syndicate of bond-buyers, at the head of which was Mr. Upham. By breaking up this syndicate and stopping the demand from America, the associates would be able to break the market in Amsterdam. Accordingly Mr. Hill suggested and procured the insertion in the agreement of March 13, 1878, with the committee, of a clause allowing the associates to withdraw from the deposit bonds for use in exchange for land, upon paying in cash the contract price, provided that the deposit should not be reduced by means of such withdrawals, below 60 per cent. of each class of bonds. (Hill, 627-8, Q. 358-361; Answer, p. 40-1.) The purpose of this was "obviously to keep down the price of outstanding bonds," by underselling the dealers. (Stephen, 1245, Q. 119-122.) This being done, Mr. Hill arranged with Mr. Upham to withdraw from the pool and act solely for the associates, which was done, and the pool was broken up, the demand for bonds at Amsterdam was destroyed, and prices fell, and the associates were thus enabled to and did purchase large amounts of "original" bonds at the thus reduced prices, and also committee's certificates. (Hill, 628-9, Q. 362-369. And see Defts.' Ex. 128-9, pp. 1303-8; Ex. 26, p. 932; Ex. 29, p. 936.)

As early as May, 1877, after the first meeting with Mr. Stephen, Mr. Hill had sounded Mr. Litchfield as to the purchase of his stock, and again in September, after the Montreal meeting in that month, Messrs. Kittson and Hill called on him for the same purpose, and

later in the same year Mr. Hill again visited him while Mr. Stephen was in Europe. Of course they were not then prepared to make an offer, but only desired to learn whether he would sell and at what price. Though he would name no price, they left him with the belief that the stock could be bought. (Hill, 615-6, Q. 285-7.)

But in June, 1878, it appeared probable that the deposit with the committee would be broken up, and the bonds not included in the sale to the associates restored to their owners. This is the subject of a letter on June 22, 1878, from Mr. Hill to Mr. Stephen. (Defts.' Ex. 129, p. 1306.) In that letter Mr. Hill pointed out that should this be done "we could not control the prices of 3's or 6's for three days after the committee surrendered their holding." To avert this result, the associates considered three things: (1) To procure the committee to retain the deposit, by re-opening their proposition for acceptance by such holders of certificates for certain issues of bonds as had not already given in their adhesion. (2) In case the committee should surrender the bonds, then to stop all demand for bonds by stopping land sales. (3) To buy the stock, and avoid the need of further bond purchases. The two first are discussed in Mr. Hill's letters to Mr. Stephen of June 7th and 22d. (Defts.' Ex. 128-9, pp. 1303-8.) Mr. Stephen's letter to Mr. Hill, of July 24th, shows that they had already reopened for adhesions, and the committee wished a reopening for *all* classes. (Defts.' Ex. 26, p. 932.)

And the threats of the Northern Pacific Co. to parallel the Branch line were an additional reason for acquiring the stock and thus expediting the foreclosure of the First Div. mortgages, the need of which caused Mr. Hill and his counsel to consider the question of dropping the suit on the $3,000,000 mortgage, and having the trustees sell under the power. (Defts.' Ex. 128, p. 1305.)

Meantime they sought by suits against E. Darwin Litchfield, to force him and his brother to terms. (Hill, 674, Q. 554-6; Defts.' Ex. 26, p. 933.)

Attempts were also made to influence the Litchfields through Mr. Bigelow, their counsel, and Mr. Becker, by means of Mr. Thompson, one of the trustees. (Hill, 666, Q. 524-5; Defts.' Ex. 29, p. 936; Ex. 109, 111, p. 1030-1.)

And the question (1) whether to buy more bonds, and (2) whether to buy the stock, were closely related. If the stock could be acquired, it was considered needless to buy more bonds. On the other hand, if the stock could not be procured, it was deemed necessary to buy all the bonds obtainable. And as they used their great majority of bonds to control and depress prices, so they meant to use the advantage gained by owning the stock to depress the price of bonds, and lower the dividend to outstanding bondholders from the proceeds of the foreclosure sale. "We have about $1,000,000 of 3's and 6's to deal with, out of which we must get enough to pay L., should we settle with him" (Hill, 667, Q. 526; Stephen, 1249-1251, Q. 144-152; Defts.' Ex. 29, p. 936.) And after the purchase of the stock, Mr. Stephen writes (Feb. 14, 1879:) "We must in some way make up our *loss* by Litchfield out of the outstanding bonds and certificates." (Defts.' Ex. 43, p. 946.)

The four associates stood in no fiduciary relations toward the stockholders or the outstanding bondholders. They dealt with both at arms' length. But if plaintiff was an associate, and especially if, as he says, he directed the policy of all in buying the stock and bonds, how can that policy be reconciled with his duties toward stockholders and bondholders alike, in his fiduciary position as receiver and general manager for the trustees in possession?

The Purchase of the Stock, and Mr. Farley's Connection with it.

The character of originator and leader of the enterprise in which plaintiff masquerades in this case would be incomplete if to the *role* of inventor and director in the matter of the purchase of the bonds he did not add that of inventor and director in the matter of the purchase of the stock. And of course his supremacy and the mediocrity of the others would not permit them to take any action without his advice and direction. His case requires that they should be mere helpers to the master workman, if not mere tools in his hands.

Accordingly Fisher, in his account of the making of the agree-

ment in question, says that plaintiff told the others that after getting all the bonds they could, "the thing to do is to try and settle with Litchfield and get his stock." (*Supra*, p. 51.) And plaintiff says that afterwards he "was urging Mr. Hill particularly, and said a good deal to Mr. Kennedy about it, the necessity of purchasing the stock to hasten the foreclosures. They finally concluded that they would make an effort to secure that stock, and hasten the foreclosures. That, I think, was early in 1879, or about that time." (107, Q. 274, 277.) "It was after a great deal of talk on my part that they were induced to see if they could not and did purchase it." (119, Q. 350.)

In a certain sense plaintiff was instrumental in inducing the purchase of the First Div. stock, the associates being strongly urged to it by their dissatisfaction with his incapable management of the property, and his disregard of their interests, and by their distrust of Fisher. (Defts.' Ex. 32-34, pp. 938-941; Ex. 131-2, pp. 1309-1312.) But it is proved that at the very outset of Mr. Smith's project—in 1874—the purchase of the stock was looked forward to as a step in acquiring the property. (Smith, 1130-1, Q. 29.)

At the meeting between Mr. Hill and Mr. Smith at Ottawa, in March, 1876, the matter of buying the stock was discussed. (Hill, 583-4, Q. 109-111.) At the meeting at Montreal in May, 1877, it was determined that Mr. Hill should interview Mr. Litchfield on the subject, which he did prior to his return home. (Hill, 599-600, Q. 186-8.) And again while Mr. Stephen was in England, in the autumn of 1877, Messrs. Kittson and Hill, at his request, again called on Mr. Litchfield on the same errand. (Hill, 615-6, Q. 285-9; Stephen, 1249, Q. 140-1.) And the consideration given to this subject by the associates in the summer of 1878 has already been pointed out.

But on this point plaintiff and Fisher are not content with general statements.

In preparing the testimony plaintiff had the benefit of two letters, one from John S. Kennedy, of Jan. 30, 1879, the other from J. S. Kennedy & Co., (written by Mr. Barnes,) of Feb. 15, 1879. These letters he introduced in evidence. (Plff.'s Ex. 165, p. 319; Ex. 167, p. 320.)

In the letter of Jan. 30th Mr. Kennedy writes:

"As regards a compromise with the shareholders, and a speedy foreclosure of the mortgages, I have very little faith in anything of the kind being accomplished. Mr. Litchfield has intimated ever since the trustees took possession, from time to time, that he would like to settle; but, whenever he was seen on the subject, his demands were so unreasonable, and he was so impracticable, that nothing could be done with him, and I do not believe now that any settlement can be made with him except through the courts."

In the letter of Feb. 15, 1879, Mr. Barnes writes:

"We have left to Mr. Hill, who has returned to St. Paul, the pleasure of giving you the result of the negotiations which for some time past have been going on with Mr. Litchfield. As Mr. Stephen and his friends have now gained possession of all Mr. Litchfield's interest, including his stock and his bonds, * * * they may be regarded as the owners of the property of the First Div. Co., as well as of the Extension lines," etc.

These letters seemed to show very clearly (1) that on January 30th the stock had not been, and probably would not be bought; (2) that after Jan. 30th, and prior to Feb. 15th, it had been bought; (3) that Mr. Hill, and perhaps Mr. Kittson, had taken part in the purchase. Here was plaintiff's and Fisher's opportunity to show Messrs. Hill and Kittson's entire dependence on plaintiff—that they were mere tools in his hands—and to supplement plaintiff's general statement as to his advice about the stock by such a detailed relation of a particular conversation as would naturally be more effective than any statement in general terms of the bald fact of a series of conversations.

And, as in former instances, it was Mr. Kittson with whom the conversation must be had.

Accordingly plaintiff testifies, (107-8):

Q. 274 (A.) I had been urging upon Mr. Hill particularly, and said a good deal to Mr. Kennedy about it, the necessity of purchasing this stock to hasten the foreclosure.

Q. 275. What stock do you refer to?

A. I refer to the stock of *the St. Paul and Pacific* and First Division Company—stock held by Mr. Litchfield.

Q. 276. You mean the capital stock of *said companies?*

A. Yes, sir; I mean the capital stock of *said companies*, which I understood, was all held by Mr. Litchfield, or nearly all. [Plain-

tiff makes a like statement on cross-examination; 160, C. Q. 220.]

Q. 277. (A.) They finally concluded that they would make an effort to secure that stock and hasten the foreclosures. That, I think, was early in 1879, or about that time.

Q. 279. (A.) As I stated before, as I understood it, they made up their minds to visit New York in connection with Mr Stephen and Mr. Kennedy, and to make an effort to secure that stock. About that time Mr. Kittson came to me and urged me to go down there; that I understood this matter better than anybody else. I had said so much about it, he thought it important I should be on hand to assist in the purchase of that stock. I refused to go and gave my reasons for it; that the Messrs. Litchfield was so well acquainted with me as a railroad man in Iowa before coming to Minnesota; and my presence there in helping to secure that stock from them would give them a great deal more confidence in the worth of it than if I would stay at home and mind my own business; that Mr. Kennedy & Co. could manage that business for us and them very much better than I could.

Q. 281-2. (A.) I didn't go. I recollect distinctly that Mr. Hill went; whether Mr. Kittson went or not, I don't know.

If matters far more serious were not involved, one might smile at plaintiff's vanity in supposing that Mr. Litchfield's knowledge of him "as a railroad man in Iowa," would influence in any way that most astute of men, than whom no one was more thoroughly informed as to the value of the property and what price he was determined to and would exact for his own "fighting interest" in it; and at his vanity in supposing that Mr. Kittson or any one else could possibly fancy that he could be of any aid to such men as George Stephen and James J. Hill, (to say nothing of Mr. Kittson himself,) in any negotiation with Mr. Litchfield—a past master in that art.

Plaintiff's certainty of recollection as to Mr. Hill's going to New York, and his uncertainty as to Mr. Kittson, is suspiciously in accord with the letter, which mentions Mr. Hill and does not mention Mr. Kittson. Plaintiff was wise in not recollecting more on this point than the letter told him. And it would have been well for him had he been as cautious in other respects; if he had confined his testimony to what he was told by J. S. Kennedy & Co., and had not undertaken to supplement the letters by inventions.

Fisher corroborates the above-quoted testimony of plaintiff, varying the language and circumstances enough to show an independent

recollection of his own, and not a mere servile following of his chief. He says (351, Q. 112-3.)

I had a conversation with Mr. Kittson in the winter of 1878 and 1879. Mr. Kittson came to me to state that they were going down to New York to see if they could buy the Litchfield stock. He says: "I want Mr. Farley to go." And he says: "Mr. Farley don't want to go. He is afraid that if he goes down there it will disclose the fact that he has got an interest in this thing." He says: "I don't think anybody need know that he has got an interest. I wish you would talk to him and get him to go." I said that I would.

Q. 114. Did you repeat that to Mr. Farley?

A. Yes, sir; I went to see Mr. Farley, and told him what Mr. Kittson had said.

Q. 115. What did Mr. Farley reply?

A. Mr. Farley said: "Fisher, now they know just how I feel about that. They know what my views are. I have told them what they can afford to pay for that stock. Now, they can make that trade better without me than they can with me. Becker hates me as he does a dog; and if I go down there and he gets an idea that I am interested in this thing, he will do all he can to keep the trade from going through."

Q. 116. Did you see Mr. Kittson again after that talk with Mr. Farley?

A. Yes, sir, I saw Mr. Kittson, and told him what Mr. Farley said. And I said: "Mr. Kittson I think Mr. Farley is right on that. I think you gentlemen can make the trade better without him, because you know how Becker is."

The gist of the testimony is:

1. That, as a result of plaintiff's advice, Messrs. Kittson and Hill had at last determined upon going to New York to negotiate, in conjunction with Mr. Stephen, a purchase from the Litchfields of the stock of *both the St. Paul & Pacific Co.* and the First Div. Co.

2. That this was in the winter of 1878-9, and, as plaintiff says, early in 1879.

3. That Mr. Kittson asked plaintiff to go and take part in the negotiations, and that, on his refusal, Mr. Kittson employed Fisher to intercede with him.

We proceed to show that this story is false in every particular; that from the estimate they then placed on plaintiff and Fisher, it

was out of the question that either Mr. Hill or Mr. Kittson should have desired plaintiff's aid, or should have made any such application to Fisher. And that on the only occasion when Messrs. Kittson and Hill or either of them went or thought of going to New York (after their visit in the autumn of 1877) on any business connected with the purchase of the stock, the stock had been already bought, and they were advised of that fact, and could not possibly have asked plaintiff to go and aid in negotiating a purchase which had been already made.

From and after the proposition to buy the bonds made in New York Jan. 5, 1878, the conduct of all business of the associates in the east was intrusted to Mr. Stephen. The only part taken by Mr. Hill or Mr. Kittson in any effort to purchase the stock was by attempting to reach Messrs. Bigelow and Becker, through Mr. Thompson, as stated *Supra*, p. 210.

Mr. Hill says that after the contract of March 13, 1878, "these interviews" (with Mr. Litchfield) "were conducted on our part mainly or entirely by Mr Stephen, representing himself and his associates." (666, Q. 525.)

"That matter, and I might say almost the entire business in the East, was left to Mr. Stephen to manage. . . . Mr. Stephen was fully aware of the views of his associates, and was fully at liberty to use his best judgment in settling with Mr. Litchfield." (Hill, 674, Q. 554.)

Mr. Stephen testifies as follows, (1255-6:)

Q. 178. To what extent in the division of labor between yourself and associates, was the matter of settling with Mr. Litchfield entrusted to yourself to be negotiated or managed?

A. It was entirely left to me.

Q. 179. From what time was it put into your hands to take charge of any personal arrangements with Mr. Litchfield?

A. From and after the time of my interview with Mr. Litchfield in the summer of 1878; that is as nearly as I can recollect it.

And elsewhere in his testimony, (1252, Q. 160-1) and his letter to Mr. Hill of Oct. 18, 1878, it appears that Mr. Stephen had had personal interviews with Mr. Litchfield in regard to a purchase of the stock. (Defts.' Ex. 30, p. 937.)

At a meeting of the associates in St. Paul, in November, 1878, about the time of making the "protocol" with the Northern Pacific

Co., the advisability of taking further steps to settle with Mr. Litchfield was considered, and Mr. Stephen says:

"It was practically decided then that if I could settle with Mr. Litchfield, that I would be doing a good thing if I did so at half a million dollars." (1251, Q. 155-6; and see Galusha, 1067-8, C. Q. 84.)

At this settlement with the Northern Pacific Co., the associates purchased from that company the stock of the *St Paul & Pacific Co.*, (Hill, 642, Q. 423,) and Mr. Billings, president of the Northern Pac. Co., undertook to act as intermediary between the associates and Mr. Litchfield for purchase of the *First Div.* stock, but accomplished nothing. (Stephen, 1252, Q. 157-9.)

Plaintiff's ignorance as to the stock, and as to the negotiations with the Northern Pac. Co., (of neither of which did J. S. Kennedy & Co.'s letters inform him), is shown by his statement, both on direct and cross-examination, that the stock of the *St. Paul & Pacific Co*., as well as of the First Div. Co., was owned by Mr. Litchfield. (197, Q. 275-6; 160, C. Q. 220.)

Toward the end of the year 1878, the dissatisfaction of the associates with Mr. Farley, and their distrust of Fisher, urged them to press a settlement with Mr. Litchfield as a speedy way of getting rid of both of them. Thus on Dec. 24, 1878, Mr. Stephen writes to J. S. Kennedy & Co., a letter, a copy of which he sent at the time to Mr. Hill, in which he says:

"I have no faith in Mr. Fisher, and I find, since my return here, that Mr. Smith has a much poorer opinion of him than I have; he has heard a good deal about his doings down Pembina way that is not very favorable." (Defts.' Ex. 32, p. 939.)

On Dec. 26, 1878, Mr. Hill writes to Mr. Stephen a letter, in which, after detailing the inefficient management, want of discipline and method, occasioning derailment of trains, etc., the need of a man like Wakeman, and Mr. Farley's refusal to "give such a man any show whatever," he says:

"All this points to the advantage to us of an early settlement with Litchfield. While I am opposed, as you know, to paying him a cent if we could help it, still I do not see that we can prudently refuse to pay him a liberal sum in order to get possession of the property, to enable us to run it as it should be run. * * * I

will always be satisfied with whatever you think best on these matters, but think the suggestions worth considering. *You know how Mr. Kittson feels on this subject.* I can look back and see how we could have saved fully $75,000 since last April, in money that has been paid out, aside from legal and other expenses, and things which I know nothing of." (Defts.' Ex. 131, p. 1311.)

On Dec. 29th, Mr. Hill, writing in the same strain to Mr. Stephen, in reply to his letter of the 24th, closes as follows:

"I note what you say about E. C. L., and trust that his letters will tend to a settlement. I am daily becoming more and more satisfied that we are losing enough in various ways to go far towards paying the amt. necessary to settle with L." (Defts.' Ex. 132, p. 1312.)

On Dec. 30th, Mr. Stephen writes in reply to Mr. Hill's letter of the 24th, and says:

"Meanwhile I feel as if I must push matters in William street; [*i. e.*, with Mr. Litchfield. See Hill, 663, Q. 512.] It is a *sin* to let things go on as they seem to be going. I have no confidence in Fisher, neither in his *ability* nor in his *loyalty* to us." (Defts.' Ex. 33, p. 940.)

On Jan. 3, 1879, Mr. Stephen writes to Mr. Hill:

"Mr. Kennedy sends me copies of two letters he had received from Mr. Farley. * * * His letter about the cost of the new road, and the reason given for its excess of estimate, is very characteristic, and indicates, I think, a poisoned mind. I fear Fisher works upon the old man's vanity to our great injury. I have written Mr. Kennedy about this, and he urges us to get the additional debenture matter settled, and then we shall be more free to talk with him. Meantime we must get along as best we can, *tiding* over things until we get into shape to help ourselves; but I would, to-day, pay off old Litchfield with greater pleasure than I have ever before felt. I am afraid of Fisher.

"I am quite agreed it would never do to ask Mr. Wakeman to come to us under present circumstances. There is only one way of getting out of all these troubles—that is, a speedy settlement with Litchfield. I hope to hear from him to-morrow." (Defts.' Ex. 34, p. 941; and see Stephen, 1256-7, Q. 185-186.)

Mr. Kittson was of course acquainted with this correspondence, and knew and shared the feelings of his associates toward plaintiff and Fisher. And even if he did not share those feelings, it is not to be supposed that he would take a step so repugnant to them as

inviting plaintiff to take part in the negotiations with Mr. Litchfield —negotiations which they were urging principally in order to get rid of him and Fisher; or that he would beg the intercession of Fisher, whom he knew his associates disliked and distrusted— of whom his old friend Mr. Smith had even "a much poorer opinion" than Mr. Stephen.

On Jan. 4, 1879, Mr. Stephen writes:

"We shall not be at peace or comfortable until we settle with Litchfield," etc., (Defts.' Ex. 35, p. 942.) and on Jan. 7th:

"Litchfield's plan for putting us into possession speedily must, I fear, have been a disappointment to you. Nothing can be done with him by writing, so I go down with Mr. Smith on Thursday afternoon, to wait there until we either reach a settlement or give up the effort to effect one." (Defts.' Ex. 36, p. 943.)

It will be noticed that in none of the foregoing letters of Mr. Hill and Mr. Stephen in Dec. 1878, and Jan. 1879, is there any suggestion that either Mr. Kittson or Mr. Hill should go to New York to take part in negotiating with Mr. Litchfield. On the contrary, that business was left, where it had long before been placed, in sole charge of Mr. Stephen.

Mr. Stephen carried out his purpose, and saw Mr. Litchfield, and on Jan. 15th telegraphed Mr. Hill from New York as follows: "Leaving for Montreal; negotiations postponed." (Defts.' Ex. 37, p. 943.)

On January 17th he wrote from Montreal to Mr. Hill:

"My message announcing the postponement of negotiations must have disappointed you and Mr. Kittson. I am in hopes, however, that some arrangement will sooner or later be reached; meantime we must proceed as if nothing of the kind were even a possibility." (Defts.' Ex. 38, p. 944.)

Enclosed in this letter, in a separate envelope, (Defts.' Ex. 40, p. 945,) marked on the face "*Personal and Private*," and on the back, "*Private*," came the following autograph letter to Mr. Hill, *which conveyed to him and Mr. Kittson the first intimation they had that the presence of either of them in New York was or would be needed or desired for any reason connected with the purchase of the stock*

Private. Jany. 17, 1879.

My Dear Mr. Hill: My wire from N. Y., announcing the postponement of negotiations, must have been a great disappointment to you & to Mr. Kittson. The fact is I have settled with the "old rat" on the basis of $500,000, covering everything but Becker's charge for trustee. The agree't however cannot be executed before the end of the month. Old L. wants some time to find out how small a sum his friends will take before an actual settlement becomes known. I too want some time to see what I can do in the way of buying assented certificates in Amsterdam before a settlement becomes known. I am at that now. The bonds & certs. in the hands of the public will fall in price when a settlement leaks out. The assented certs. on the other hand increase. We shall all have to meet in N. Y. the week after next, to execute the agreet. We have to pay Litchfield $100,000 down, on his turning the compy. over to us. Once we get the reins, the trustees will hand the road to us, & old Farley will have to confine his duties to his receiver road, & these he will very soon be relieved of.

Now not a word about a settlement must be said, & no one in St. Paul must know about it, except of course Mr. Kittson, not even the lawyers. The old rascal's idea is to bring Bigelow & Becker to N. Y. to *make* an *agreet.*; they must not know or have an idea that we have made one already, or all the fat would be in the fire. Old L wants to cheat both of them, and it is not our policy to interfere.

You better be quetly getting ready for a trip to N. Y., without saying a word to any one that you have such a thing in view. I had a terribly wearisome 4 or 5 days in N. Y. with the old fellow.

Yours, &c.,

Geo. Stephen.

J. J. Hill, Esqr.

This letter, thus giving Messrs. Kittson and Hill the first intimation that they would be wanted in New York, also told them that the settlement with Mr. Litchfield *had already been made.* Mr. Hill testifies that upon receipt of this letter, "it was shown by me to Mr. Kittson and Mr. Galusha, his attorney or representative. Upon receipt of the letter, the letter was shown to Mr. Kittson or read to him; I do not recollect which." (671-2, Q. 542-3.) Mr. Galusha says: "If Mr. Kittson was here at the time, the facts were undoubtedly communicated to him at the date. I am not quite sure whether he was here on that date or not." (1067, C. Q. 82.)

And Mr. Galusha, who went with Mr. Hill to New York, when summoned by Mr. Stephen in accordance with the letter, says that he was aware before leaving St. Paul that the price for the stock had been agreed on—that is, was aware of this letter. (1052, Q. 60.)

And it needed no testimony to prove that Mr. Hill, on receipt of this letter, would have at once communicated news of such importance to his associate, and he or Mr. Kittson would probably have informed Mr. Galusha, who was not merely one of the legal advisers of the associates, but was Mr. Kittson's representative, and, in fact, went to New York in his place on this occasion.

If Mr. Kittson was in St. Paul he was shown the letter. If he was not there he could not have had the conversation. The telegrams (*infra*) requesting his presence in New York were addressed to and received by Mr. Hill. If Mr. Kittson knew of the telegrams, and so knew he was wanted, he must have known of the letter—must have known why he was wanted.

On Jan. 30, 1879, Mr. Stephen wired Mr. Hill from New York: "Be ready come here in case wanted." (Defts.' Ex. 41, p. 945.) And on Saturday, Feb. 1st, he wired Mr. Hill: "Be here Tuesday morning without fail." (Defts.' Ex. 42, p. 945.) This message was received in St. Paul the same day, and Mr. Hill and Mr. Galusha went to New York. On arriving there they found that Mr. Stephen had made with Mr. Litchfield the agreement mentioned in the letter. And Mr. Stephen says: "We had arrived at a positive understanding and agreement when that letter was written," and nothing in the way of negotiations with Mr. Lichfield remained to be done. (722, Q. 172-4; And see Hill, 673, Q. 547; 675, Q. 557; Galusha, 1052, Q. 59, 61.) And there was nothing to advise with plaintiff or any one else about, except to provide the money to carry out the agreement. (Hill, 673-4, Q. 553.)

These things, however, remained to be done, viz.: "We had to arrange the payments to be made to Mr. Litchfield," and "the money had to be provided to pay him, and the organization of the company had to be turned over to us" (Hill, 673, Q. 550-1; Galusha, 1052, Q. 61; Stephen, 1254, Q. 173.) The money that had to be provided was procured on the credit and obligations of

Messrs. Smith, Stephen, Kittson, and Hill. (Hill, 673, Q. 552; Stephen, 1256, Q. 184-5.)

Neither Mr. Hill nor Mr. Galusha can state positively whether Mr. Kittson went to New York on this occasion. But the record of the directors' meeting on Thursday, Feb. 6th, when the company was turned over to the purchasers, makes no mention of his presence. And the fact that Mr. Galusha and not Mr. Kittson was made a director would indicate that the latter was not present. (Defts.' Ex. 153, p. 1540.)

Counsel argued in the circuit court that Mr. Stephen, in enjoining secrecy, had plaintiff specially in mind—*ergo*, plaintiff was an associate. But mention to any person "even the lawyers" might bring the news to Becker and Bigelow. As Mr. Litchfield's secret, the matter was to be concealed from *every one* in St. Paul. Hence the caution. Mr. Galusha, however, was not merely a lawyer, but was the *alter ego* of Mr. Kittson, who went to New York for him on this occasion, and of course had to be informed,—and this was whether Mr. Kittson was in St. Paul, so as to be informed, or not.

This evidence not only shows that in the existing relations between plaintiff and the associates, who were impelled to a purchase of the stock by their need and desire to get rid of him, it would have been in the last degree improbable for Mr. Kittson to ask him to go to New York to aid Mr. Stephen in negotiating the purchase—even if the idea of such a man as plaintiff aiding such men as Mr. Stephen, Mr. Kittson and Mr. Hill, or any one of them, in such a matter were not of itself preposterous and ludicrous. It shows a great deal more. It proves conclusively that on the only occasion when Mr. Kittson thought or could have thought of himself or Mr. Hill going to New York for any purpose connected with the purchase of the stock—and consequently on the only occasion when he could have asked plaintiff to go with him or for him—he knew that the stock had been bought; that the negotiations were concluded; that a settlement had been already reached without his aid or plaintiff's; that there was nothing to negotiate about with Mr. Litchfield, nothing in which plaintiff's diplomatic genius could find any field for exercise. And it is not within the bounds of possibility that the conversations detailed with such minuteness

by plaintiff and Fisher could ever have taken place. This evidence, which cannot be gainsaid, proves conclusively that Farley's and Fisher's testimony on this point is pure falsehood, unadulterated by a grain of truth.

But how came they to make such statements, if wholly unfounded in the truth? That is a question for them to answer. Called in rebuttal, they did not attempt to explain their original testimony—did not even attempt to help it out by shifting the date, as they had done with their stories of the agreement sued on and of the newspaper article. Farley's testimony remains that the conversation was "Early in 1879," and Fisher's "in the winter of 1878 and 1879," and they agree that Mr. Kittson and Mr. Hill were then about going to New York to see if they could buy the stock.

The question which they have not answered admits of but one solution, and that an easy one.

Instead of being the director of the enterprise and fully informed of what was done or contemplated, Mr. Farley, in fact, knew little or nothing of the transactions of the associates except what was told him in the letters of Messrs. Kennedy & Co. He did not know that Mr. Kennedy's letter of Jan. 30th, (which he himself introduced) was written after the purchase had been agreed on—and Mr. Kennedy knew it was agreed on; was written, as Sir Geo. Stephen testifies, (1255, Q. 177,) in pursuance of Mr. Litchfield's wishes that the settlement should be kept secret,—"that nothing should be known in St. Paul about it." (And right here may be noted how fatal is this letter to the claim that Mr. Stephen or even Mr. Kennedy supposed plaintiff to be an associate. Had they thought him such, would Mr. Hill have been enjoined to tell no one but Mr. Kittson?) In his ignorance he supposed that on Jan. 30th the settlement had *not* been made, and that Mr. Hill's visit to New York, of which he was advised by Mr. Barnes' letter of Feb. 15th, (Plff.'s Ex. 167, p. 320,) was, as that letter would indicate to one ignorant of the real facts, a visit made for the purpose of negotiating for the stock and during which the stock was purchased.

And having those letters, showing, as he thought, that Mr. Hill went to New York to negotiate for the stock, what easier, what more helpful to his case, than to supplement them by these conver-

sations with Mr. Kittson? They would show his intimate knowledge of what was done and about to be done, would show that he was the master and the others the pupils; would show that his services and advice "were indispensable to the success of the enterprise." And it would be testimony not to a "glittering generality," but to a concrete fact, with time, place and circumstances so detailed that it must command belief. True, Mr. Kittson would deny it. But he was a party interested, and against him would be two witnesses, one of them "disinterested;" the fact was such—conversations with no one present but the witnesses—that their own positive testimony could not be disproved, nor Mr. Kittson corroborated, by the testimony of third persons or by circumstances. And their own story would be in harmony with Mr. Kennedy's and Mr. Barnes' letters of Jan. 30th and Feb. 15th, and be corroborated by them.

So tempting an opportunity could not be neglected. Misled and betrayed by the letters and by their ignorance of aught but the letters, they invented the conversation just as they had invented the conversation at which the pretended agreement was made; just as they invented the conversation in which Mr. Farley saved the enterprise by dissuading Mr. Hill from sending a man to Holland; just as they invented the conversation with Mr. Kittson about a newspaper article in February, 1878, and the story about Mr. Kittson asking Mr. Farley to go on with him to New York to sign the agreement with the committee on March 13, 1878. In each instance it so happened that there were in existence contemporaneous letters, of which they were not aware, which proved the falsity of their stories—proved alike their ignorance of the real transactions of the associates and the falsity of their testimony. And in this last instance the very letter of Jan. 30th on which they relied for support is proof of the strongest kind that plaintiff had no interest in the enterprise, and that the conversation could not have taken place.

And it is vain to say that any of these narratives the witnesses have fallen into innocent mistakes. The character of their testimony is such that in no one of these instances would such an excuse be available. And when these instances are repeated—when in each case the story fits so well with the fragments of fact

learned by the witnesses from the letters of Kennedy & Co., and was so evidently made to fit with those facts—the theory that each story proceeded from an innocent mistake is as incredible as the stories themselves. And just as the stories, if true, would each have helped the other, the truth of one being an argument for the truth of all, so the falsity of even one would at least throw doubt on the integrity of the others and of the witnesses; and the falsity of two or of three—and, most of all, the proved falsity of all four of them, cannot be accounted for on any theory of mistaken recollection or innocent mistake on the part of either Farley or Fisher.

That each of two witnesses should in the same case honestly fall into four or three or even two such mistakes—mistakes so suspiciously in accord with the facts as imperfectly stated in J. S. Kennedy & Co.'s letters, mistakes in recollecting what never happened or could have happened, and the mistakes being in each case such as would help along a claim for millions of dollars—would be little short of miraculous.

The First Claims Made by Mr. Farley Before Bringing Suit.

Plaintiff states that after the purchase of the stock, and at a date which he cannot fix, he called on Mr. Kittson and said that, as they were both old men, the agreement between them "ought to be put in writing—black and white." He says that Mr. Kittson thought the suggestion a good one, and would see Mr. Hill, and the three would get together "and reduce our understanding to black and white," and an appointment was made for a meeting for that purpose at Mr. Kittson's office the next day; that before he left Mr. Kittson, the latter said Mr. Hill had been talking with him, "and thought that my interest should not be equal, or quite equal to theirs," because they "*unexpectedly*, at a certain time in the progress of the negotiations that had been pending, *had to raise some money;* and, in order to raise this amount of money necessary, they had to mortgage everything they had, and had not called upon me to raise my share of it; and if the thing had been a failure, that he himself would have to go to the poor-house—Mr. Kittson." At

this plaintiff says he was indignant, and "I told Mr. Kittson *it was no part of the contract that I should raise any money;* but if it had become necessary, with this property behind me, I could raise as much money as him or Mr. Hill either, and he gave me no opportunity to do so. Mr. Kittson saw that I was somewhat excited over his remarks—what Mr. Hill had said, and said to me: 'Mr. Farley, you know what Jim Hill is as well as I do, and it is all right.'" (119-120, Q. 351.)

He says he then left Mr. Kittson's office, and returned thither at the appointed time, and, after waiting for a hour outside the door, he saw Mr. Kittson and Mr. Hill, arm in arm, walking away from the office. (120, Q. 352.) Feeling unpleasant, he sent a note to Mr. Hill, asking him to call in the evening at the office of the receiver and general manager, which Mr. Hill did. According to plaintiff, Mr. Hill, at this interview, temporized with him, assured him it was all right, said "Farley, you know I'll never go back on you," and urged him to wait until Messrs. Stephen, Smith and Kennedy, who, he said, "were all interested with us," should arrive, which would be in about ten days. Plaintiff says that he said to Mr. Hill: "I have no contract with Mr. Stephen, Mr. Smith, or Mr. Kennedy. My contract is with you and Mr. Kittson," and he said he couldn't see the necessity of waiting; and that Mr. Hill's "reply was that they are all interested now—we are all interested together," and he would do nothing till they came out; and when they came, in about 10 or 15 days, and plaintiff suggested getting them together, Mr. Hill made light of it, and there was no meeting, and plaintiff saw that Mr. Hill intended to ignore his interests entirely, and that what had been said before was only to let him down easily, and he says that was his last attempt to have an amicable arrangement. (120-1, Q. 353-4.) Why he made no further effort *with Mr. Kittson* he does not disclose.

On cross-examination the defendants' counsel endeavored to have plaintiff fix the date of the conversation with Mr. Kittson. He thinks it was within a month after he learned of the purchase of the stock, but can't say that it was before April 1st, (161, C. Q. 225-7.) He says, however, (162, C. Q. 237-8,) that his evening interview with Mr. Hill was not more than two days after his talk

with Mr. Kittson, and was the last conversation he had with Mr. Hill.

From evidence afterwards introduced it clearly appears that the evening interview must have been after the organization of the Manitoba Co., which was organized May 23, 1879. (Stephen, 1260, Q. 198.)

Plaintiff's testimony as to his making a claim has the advantage of much of his other evidence in that there is an element of truth in it. He did write Mr. Hill requesting him to call, Mr. Hill called, and a conversation took place, though not such as detailed by plaintiff.

Whether he previously had an interview with Mr. Kittson rests on his own testimony alone—testimony entitled to no weight unless fully corroborated. And it is very clear that Mr. Kittson could not have given, as a reason why plaintiff should not have an equal share, the fact that "they, Mr. Kittson and Mr. Hill, *unexpectedly*, at a *certain time* in the negotiations that had been pending, had to raise some money; and in order to raise this amount of money necessary, they had to mortgage everything they had."

To plaintiff, in his ignorance of the actual relations and agreements between the associates, this may have seemed a probable remark to be attributed to Mr. Kittson. He did not know that at the very outset when an offer was made that involved any liability, (on Jan. 5, 1878,) the associates agreed that, while Mr. Stephen was to attend to the getting of the funds, it was to be obtained by means of the joint obligations and the securities of all. He did not know that Messrs. Kittson and Hill, not "unexpectedly" nor "on a certain occasion," but pursuant to their agreement and repeatedly, had been obliged to join in raising money, and had pledged, not for a single loan, but for whatever debts might be incurred, every available security they owned. But Mr. Kittson did know this, and if he were making excuses, or repeating Mr. Hill's excuses, for not giving plaintiff an equal share, he would not have made a statement untrue in itself, and not furnishing nearly so good a reason as the plain truth.

Again, Mr. Hill could not have said that Mr. Kennedy was interested. That he was not was decided in *Sahlgard* v. *Kennedy*, 13

Fed. Rep. 242, against Mr. Farley's testimony. Plaintiff has himself introduced in evidence Mr. Kennedy's deposition in that case positively denying any interest. (Plff.'s Ex. 244, p. 1742, Q. 6-8; pp. 1757-8, C. Q. 26-32; pp. 1759-1761, C. Q. 40-4. And see p. 1763, C. Q. 54.) And plaintiff, himself, whose testimony called out that of Mr. Kennedy in his deposition in that suit, has stated in his testimony in this case, when called by defendants:

"I don't wish to criminate Capt. Barnes. I have no recollection of any conspiracy with Capt. Barnes in any way. * * * I don't wish to be understood as—I have no wish to implicate Mr. Barnes or Mr. Kennedy in anything of this kind; they always talked the contrary to me." (1380, Q. 134; 1382, Q. 141.)

But he did have an evening interview with Mr. Hill, who says that plaintiff began by complaining that in the new organization he had not even had the compliment of being made a director; that while Mr. Bigelow and Mr. Galusha, "without reputation, capital, or railway experience," had been placed in the board, he had been left out. He then said he "had run the soles off his shoes trying to take care of the property," and now that Mr. Hill and his friends were "going to make a big thing—a lot of money—out of it," he "was entitled to some consideration." He spoke of $100,000, in money or stock, Mr. Hill does not remember which, and said they ought to pay him something "to take care of the old man in his old age." Mr Hill reminded him that he had been getting a salary of $10,000 on each line—$20,000 a year in all; that he had many of his own family pensioned on the company, without regard to their ability to earn their salaries, and had himself spent an average of not more than 20 days in each month here, devoting the rest of the time to his own business elsewhere; and that in Mr. Hill's judgment he had been amply paid for all his services. But Mr. Hill also said:

"Mr. Farley, if you have any claim against the property, I wish you would put your claim in writing, and I will submit it to my associates; they will be here in a few days, and it will be fairly considered, and, if there is anything due you, it will be paid." To this Mr. Farley said that "if you don't think there is anything coming to me, your associates will not pay it." Mr. Hill said he thought that was true, and that, on Mr. Farley's own statement, "I don't think you are entitled to any further compensation."

Plaintiff then grew angry, wanted Mr. Hill to understand that he was receiver of the Extension line; that though Judge Dillon had fixed an upset price for that line in the order for sale, he wanted Mr. Hill to understand that other people could raise money besides himself and his Canadian friends, and they would find that they would have to pay a good deal more than they expected for the Extension line unless they settled with him, Farley. Mr. Hill replied that it was true Mr. Farley was receiver, "and, as such receiver, it was his duty to see that the Extension property sold for the utmost cent it would bring in the interest of the bondholders—and that we were the bondholders," and took his departure. (Hill, 693-4, Q. 621.)

Mr. Hill's statement clearly shows that this interview (and hence the alleged interview with Mr. Kittson) was after the date (May 23d) of the organization of the Manitoba Co. The plaintiff, in his testimony, says he had but one interview with Mr. Hill, and he says in his bill of complaint, par. IX, (11:)

"That the said defendants Kittson and Hill never denied, disputed, or questioned, but always admitted and recognized, the right of your orator, under the said agreement and understanding between them, to an equal share and interest in said enterprise, and in the results and avails thereof, with them, the said Kittson and Hill, *until after the organization of said defendant railway, in May, 1879*, and *then, at first*, only intimated or suggested to your orator that his share or interest ought not to be equal to theirs, as they had, they claimed, been required to advance some money in carrying out said enterprise."

(This statement makes its first appearance in the original bill filed in this court, Nov. 13, 1880. It is not found in the complaint in the suit in the state court. Defts.' Ex. 164, p. 1569. It is true to this extent—that the defendants did not deny that the plaintiff was interested, and for the reason that he never asserted any interest, and they never heard of any.)

And Mr. Hill's statement as to the date and character of this the *sole* interview between himself and plaintiff in which plaintiff advanced any "claims," or made any request to be remunerated out of the profits of the enterprise, and his recital of the conversation between them, and the nature of plaintiff's "claims" then put

forward, are fully corroborated by two contemporaneous letters of plaintiff already printed in full. (*Supra*, p. 150, 151.)

The first is found in Mr. Kennedy's deposition in the *Sahlgard suit*, which is part of plaintiff's evidence in rebuttal in this cause. (Plff.'s Ex. 245, pp. 1751-2) It is addressed to Mr. Barnes, and has no date, but was evidently written after the organization of the Manitoba Co., May 23d. The writer says:

"Since the election of Bigelow & Galusha as Directors in the New Company, Men of no Money, railroad experience or Influences, And myself left out in the *cold*, I am forced to the conclusion that My time and claims on the St. Paul & Pacific is Short. I did expect better things of Hill & Kittson. I had a talk with Jim Hill *last knight*. He disclaims any intention on his part to ignore my claims. But he is such a Lyer cant believe him. It is a matter of astonishment to every Person in St. Paul to see the way Jim handles Mr. Stephens. * * * You must not blame me if I should try to get even with Jim Hill before I leave here."

On receipt of Mr. Kennedy's letter of May 26, 1879, announcing a visit to St. Paul, (Plff.'s Ex. 168, p. 322,) plaintiff wrote on May 29th, and left to be handed him on his arrival, the letter printed in full at page 151, *supra*, and which is Defts.' Ex. 141, p. 1492, in which he says:

"Pressing Business compells me to be absent a few days. I have had some sharp talk with Mr. Hill. If he Persists in his Present course to ignore all my claims to Share in the *honors* or *profit* to some small degree, he may have cause to regret it."

And when questioned by the defendants before the last letter was shown him, Mr. Farley says: "I have no recollection now, sir, of having written any such letter, but I looked to Mr. Kennedy largely to see me righted in this matter." And to the next question he says: "If I wrote any such letter, sir, I stated what was my belief and impression at the time the letter was wrote." (1399-1400, Q. 215-6.)

These letters, one of which was written to the man to whom he looked to see him righted, and which doubtless stated, as he says it did, "my belief and impression at the time," and the first of which was written the day after the talk with Mr. Hill, and the second within a very few days, fully agree with Mr. Hill's statement and are utterly inconsistent with Mr. Farley's, and with his claim in

this suit. If he had been the originator, or one of the originators, of the enterprise, entitled by contract to an equal interest with Mr. Kittson and Mr. Hill from the beginning, (and especially if, as he says, Mr. Kennedy was fully informed of the contract,) he would speak of his contract and his rights—not of his "claims;" of his contract right to an equal interest—not of "*all my claims* to share in the honors *or* profit *to some small* degree." These are the letters of a man who thinks that by reason of his services rendered, or of expectations held out to him—or both—and by reason of the fact that the associates are realizing a great deal of money, he ought not to be "left out in the cold," he ought to be remembered with a directorship or a "bonification"—he ought to be allowed "to share in the honors or profit to some small degree."

And why is it that in these letters and throughout his testimony in this case, all plaintiff's vilification is reserved for and poured out upon Mr. Hill? If the agreement had been made, and if his grievance was a breach of that agreement, why was not Mr. Kittson as guilty as Mr. Hill? Was Mr. Hill's refusal to keep faith with the plaintiff any excuse for Mr. Kittson's wrong-doing? Or did Mr. Hill's refusal in any way prevent Mr. Kittson from keeping his part of the agreement, and giving plaintiff one-third of his own share of the stock—stock issued to him "in his own individual name and right," as is admitted in the pleadings,—and of the other profits? Was Mr. Kittson so under Mr. Hill's thumb that he could not do plaintiff justice merely because Mr. Hill said, No?

The plaintiff, in cross-examining Mr. Hill, has put in evidence a biographical sketch of Mr. Kittson, showing him to have been a man of uncommon ability and strength of character—not a man to be anybody's tool. (706-8, C. Q. 64-5.) And the plaintiff labors to prove that Mr. Kittson never denied the fact of the agreement, nor the justice of his claim.

In the so-called "cross-examination" of the plaintiff by his own counsel, when called as a witness by the defendants, he and his counsel alike aim to show that plaintiff's relations with Mr. Kittson continued friendly long after the suit in the state court had been brought. The testimony was clearly incompetent as cross-examination, and was also within the express prohibition of the act of

congress, being given on July 19, 1888, two months after Mr. Kittson's decease. We quote:

C. Q. 18. Did Mr. Kittson at any time, face to face with you, in conversation with you, deny to you that you were interested with him in and about the enterprise of purchasing said bonds and acquiring said railroad property?

A. He never did, sir.

C. Q. 19. Up to the time when this suit was brought, [Nov. 13, 1880,] what continued to be the personal relations and expressions by Mr. Kittson towards you individually of and concerning the matters which are here in controversy?

A. There was never any personal feeling between myself and Mr. Kittson. I as frequently saw Mr. Kittson and had interviews with him on the current events of the day when I was in St. Paul as any other old acquaintance. *To further substantiate what I have said about our friendship I would here introduce a letter that Mr. Kittson wrote me.* (1439.)

And then he introduces a letter (Plff.'s Ex. 212, p. 1498,) dated Jan. 14, 1880, in reply to a letter of plaintiff of Nov. 29, 1879, in which plaintiff had evidently complained that Mr. Kittson "acted coolly" towards him, and had also told him of the "ignorance and neglect" of Mr. Hill, then general manager of the Manitoba Co., by reason of which the road was "going to ruin." Mr. Kittson replies:

"I regret that you should have had the impression that I acted coolly towards you, for it is far from my intention to do so. I do not consider the differences between us as sufficient cause to influence our friendly intercourse.

"With regard to the matter about which you write me, it is most likely the case, as you state it, 'that there are leaks all over the road,' but unless I can be informed of some special one caused by the mismanagement of the road, I could not, of course, make the necessary inquiries, and ascertain whether or not the wastage, loss, or damage is caused by the ignorance or neglect of our Gen. Manager. As you are well aware I am no railroad man, and therefore any mismanagement of the road cannot be seen or observed by me unless it is directly pointed out to me. I would regret very much to see the road get into trouble, and for my part I am determined that it shall not go to ruin if any action on my part can prevent it, even should the necessity arise to make a change."

Is this the letter of a man so far under Mr. Hill's influence as to

be excused for not keeping his contract with plaintiff, while Mr. Hill for the same cause is to be vilified? And yet plaintiff is anxious to show himself on good terms with Mr. Kittson, while in his letter to Barnes he flings billingsgate at Mr. Hill, and even says: "Mr. Kittson has told me time and again that Jim Hill was the worst man he ever saw." And it is Mr. Hill and not Mr. Kittson with whom he is to "get even," and who is to "have cause to regret it."

And in the circuit court, plaintiff's counsel, beginning with an assumption (absolutely without evidence) that the business relations between Mr. Kittson and plaintiff prior to 1876 had resulted in an "intimacy" and "friendship," advanced this further theory, equally without basis in fact, viz: Messrs. Kittson and Hill proceeded in full recognition of the pretended agreement until early in 1878, when Mr. Hill devised a scheme to cheat plaintiff out of his interest. He brought over Mr. Stephen and Mr. Smith to his plan, and together they "overruled" Mr. Kittson, who was strongly opposed to it, and began "a course of deception" towards plaintiff, the first overt act being Mr. Kennedy's letter of April 4, 1878, instigated by Mr. Stephen, and printed *supra*, pp. 185-6, and which course of "circumvention and duplicity" was intended to and did "lull Mr. Farley into a fancied security," the purpose of the conspirators being to "retain his co-operation, assistance and advice," and then drop him, on the pretext that, being receiver, he could not lawfully be an associate. And Mr. Hill, who at the outset was a mere humble dependent of Mr. Kittson, grew during this short period to a position of mastery over the other associates, which enabled him to compel Mr. Kittson to refuse, against his own wishes, to do justice to the plaintiff. In short, that this is really a suit between Mr. Kittson (in his lifetime) and plaintiff, on the one hand, and Mr. Hill on the other. But, after division made between the associates, prior to plaintiff's first suit, there was nothing to prevent Mr. Kittson from throwing off the yoke and satisfying the claim of plaintiff to one-third of his share of the profits. And yet Mr. Kittson defended against this suit to the day of his death.

And in his same "cross-examination," after Mr. Kittson's death, plaintiff makes a statement, wholly incompetent, (and wholly false,

for Mr. Kittson was not the man thus to speak of one, behind his back, with whom he was in close relations of friendship and business, nor was he the man to contract those relations with, and declare under seal his entire confidence in, a man toward whom he thus felt, or of whom he could thus speak.) He says:

"Occasionally Mr. Kittson would seek an interview with me separate, because, *for reasons that I understood*, he seemed to have a great deal of confidence in my judgment, and frequently gave me credit for working wonders in the bettering of this property that I had taken hold of, and occasionally he wanted to talk with me about matters that he didn't care about 'Jim,' as he called him, understanding or knowing and did on such occasions seek an opportunity to find me privately. And I do not know as it is proper for me to state, Mr. Kittson told me that he hadn't a great deal of confidence in Mr. Hill. While he had a great deal of confidence in his ability, shrewdness and tact, he didn't have a great amount of confidence in his honesty, and relied upon me to take care of things generally." (1428.)

In this ebullition of vanity and malice, the plaintiff does not seem aware that his falsehoods reflect as much upon Mr Kittson as on Mr. Hill. That Mr. Kittson or any of the associates in this enterprise should or did have any secrets from Mr. Hill, and especially that Mr. Kittson, who took a far less active part than Mr. Hill, should be aware of matters that Mr. Hill was not to know, and should tell them to plaintiff, and to this fraud on Mr. Hill should add the treachery and meanness of blackening the character of his associate—and, as plaintiff says, their common associate—to plaintiff, is incredible. This story is simply another of plaintiff's inventions to help out his case, and at the same time exhibit his own self-importance, and gratify his malice and vindictiveness towards Mr. Hill.

But all this shows that while Mr. Kittson as well as Mr. Hill has never made with plaintiff the division claimed in this suit, and has never recognized the right which plaintiff says he asserted in their interviews; and while, if this was the claim made by plaintiff, Mr. Kittson was in no way under Mr. Hill's influence, (and if he were, it could be no excuse,) but was equally with him guilty of wronging the plaintiff, still plaintiff has nothing but good words for one,

nothing but defamation for the other. This is simply unaccountable if plaintiff really believed himself entitled to the millions claimed from Mr. Kittson as well as from Mr. Hill.

But plaintiff's different feelings towards these gentlemen are easily accounted for by the real facts of the case, as stated by Mr. Hill and shown by the other evidence. Plaintiff's vanity and self-importance naturally led him to think himself indispensable to the new organization, and to expect that he would, moreover, have a substantial *douceur* out of the great profits the associates would soon realize. Moreover, Mr. Kennedy's letter of April 4, 1878, written at Mr. Stephen's suggestions, (*supra*, 185-6,) had told him that Mr. Stephen had said "that both Kittson & Hill had showed the most kindly feeling towards you, and that he and they wanted you to remain and aid them in completing the lines this year, and intimated very plainly that they both could and would make it worth your while to do so. They have no idea of superseding you," etc. And from this and Mr. Kittson's talk with him early in 1878, when, as he thought, "it has been more than intimated to me that Mess. H. & K. would be pleased to make me interested in their Shares of what may result from this trade," he doubtless thought (though he had been unwilling to go into the enterprise and take the risk, even when he supposed he had an opportunity) that somehow he was to be remembered by the associates when they finally got the property. And very likely he may have thought that his "bonification" was to come out of the shares of Messrs. Kittson and Hill. On this point, however, when he presented his "claims" to Mr. Hill, he was speedily undeceived. The leaving him out of the directory was a severe blow to his vanity, and it behooved him to look to his pecuniary reward. He accordingly goes to Mr. Hill with his "claims"—the great labor he has gone through, the great service he has rendered the property, the "big thing" the associates are to make, out of which they may easily provide for him in his old age. In a certain sense Mr. Hill "disclaims any intention to ignore my claims," (as written in the letter to Mr. Barnes,) for he tells plaintiff to put them in writing, and he will lay them before the associates. But he says very plainly that he doesn't think plaintiff entitled to anything more than

he has already had. Plaintiff was aware that the associates would not act counter to Mr. Hill's views,—("It is a matter of astonishment to every Person in St. Paul to see the way Jim handles Mr. Stephens,")—and when he suggested that they would not make any payment not recommended by Mr. Hill, that gentleman entirely agreed with him.

And here was plaintiff's grievance. *Not* that Messrs. Kittson and Hill had broken a contract, in which case he would have equal cause for animosity against each; but that Mr. Hill had—and Mr. Kittson had not—stood in the way of a recognition of his "claims" by the associates. Hence his anger and his threats in his letters, and his abuse of Mr. Hill throughout his testimony, and the absence of any animosity against Mr. Kittson.

Some allowance is, of course, to be made for the influence, on plaintiff's feelings towards Mr. Hill, of his wounded vanity, and his being obliged to submit to having his acts criticised and overruled by Mr. Hill, during the winter of 1878-9, and his being obliged to consent to Fisher's enforced resignation, and Mr. Wakeman—Mr. Hill's choice—being appointed to his place on the First Div. lines; and doubtless these feelings have since been intensified by Mr. Hill's great success, first as general manager and then as president of the Manitoba Co., whose road, in November, 1879, he wrote Mr. Kittson was going to ruin through the ignorance of the general manager. But all these grievances would be as nothing to that alleged in this case—the breaking of a contract under which plaintiff was entitled to millions,—of which Mr. Kittson was as guilty as Mr. Hill, besides masking his perfidy under a guise of friendship of which Mr. Hill made no pretence. And making every allowance for all these other matters, plaintiff's bitterness toward Mr. Hill, and not toward Mr. Kittson, is not reconcilable with his claim in this case, and can only be accounted for by his knowledge that it was Mr. Hill who stood in the way of his receiving that "bonification" which he had done so little to merit, but which he had expected to receive.

And as Mr. Hill's account of their interview and of the claim then made by plaintiff is in full accord with the conduct of plaintiff

himself, with which his own version is wholly at variance, so it is borne out by the testimony of Mr. Kennedy and Sir Geo. Stephen,

Mr. Kennedy says that when he was in St. Paul, in March, 1879, and plaintiff gave his reluctant consent to Mr. Wakeman's appointment, plaintiff complained to him of Mr. Hill's interference with him as general manager, and said that it was evident the associates did not wish him much longer connected with the property, and that it was evident that he was not going to get much, if anything, out of it. Mr. Kennedy asked him what he meant, and—

"He said he had always understood or been led to expect that he was to have some small share in Kittson and Hill's share in the enterprise, but it was evident now they were not going to do much if anything for him. He also said, in that same connection, that his expectation was that they would give him some stock in their new company, when organized." (1599.)

Mr. Kennedy goes on to say that on leaving plaintiff he went to Mr. Stephen, and told him what had been said, and asked him if Farley had been promised or led to have any such expectations, and he replied that was the first he ever heard of it. They then went together to find Mr. Hill, but did not find him, and then went to Mr. Kittson, to whom Mr. Kennedy repeated what plaintiff had said about his having or expecting an interest. And he says:

"Mr. Kittson expressed the utmost surprise at the statement, said it was all nonsense; that after the negotiation of the associates in New York with my firm, he had offered or intimated to Mr. Farley that he might have some interest with him or them. (I cannot say now certainly which,) but that Mr. Farley had declined it, remarking that he had no money to put up, and that he would not risk a dollar on it; and that was the end of it, so far as he was concerned.

"He also added that it was hardly the thing to come now, when it looked as if it might turn out a good thing, and claim an interest, when, if it had turned out a bad thing, they would all have had to go to the poor-house; but he added he had always had a kindly feeling towards the old man, and, provided they got through all right, he meant to do a little of something for him." (1599-1600, Q. 13.)

On pages 1604-5, answering Q. 15, Mr. Kennedy repeats the substance of the above-quoted testimony, and adds:

"The last time I ever saw Mr. Kittson, which was when he called one day at my office in New York, I think about a year and a half or

two years ago, in conversation with me regarding Mr. Farley's claim, he made precisely the same statement that he made to Mr. Stephen and myself in March, 1879, as above stated with substantial accuracy."

Mr. Kennedy, continuing, says that he and Mr. Stephen then went to see plaintiff, who repeated substantially what he had before said to Mr. Kennedy, and Mr. Stephen asked that the whole matter be left to him, "and he would see that Kittson and Hill carried out any promises they had made or expectations they had held out to him. Mr. Farley assented and appeared to be much pleased at what Mr. Stephen had said to him." (1600, Q. 13.)

And Mr. Kennedy also says that at the last-mentioned interview, in March, 1879:

"Mr. Stephen stated to Mr. Farley that he intended or looked forward to making him a director in the new company, when organized, as he wanted the benefit of his experience and knowledge of the country; and it was with reference to this statement that Mr. Farley, [in a later conversation with Mr. Kennedy, in June,] complained he had not been made a director." (1602, Q. 13.)

Sir George Stephen testifies substantially in accord with Mr. Kennedy as to the interview between himself, Mr. Kennedy and Mr. Farley, although it will be observed that he places it later than Mr. Kennedy—"about the time of the re-organization of the Manitoba Co.," May 23, 1879.

His testimony is as follows, (1260-1, Q. 199-205:)

About the time of the re-organization of the "Manitoba" Company, I remember a conversation that took place, I think at the Merchants' Hotel, between Mr. Farley, Mr. Kennedy and myself. Mr. Farley complained very much of being "left out," as he expressed it; that we had appointed people to the board of directors who had no experience as railway men, and he seemed to think that that was an honor that he deserved to have. Mr. Kennedy explained to him that it was impossible he could become a director —being receiver—and then it was, I think, at that interview, that he spoke of promises made by Mr. Kittson and Mr. Hill to him, and that he wanted to have those promises put in "black and white." He was not willing to leave anything of the kind in an indefinite shape—that he had no confidence in Mr. Hill. Mr. Kennedy and I (myself especially) tried to assure him that he should be satisfied that any promises that Mr. Hill and Mr. Kittson ever made

to him would be carried out; that I would undertake that they would carry them out. The impression made upon my mind at the time, and I think I said so to Mr. Kennedy—I said that Mr. Farley understands now the reason why he cannot be a director; we have explained that to him, and that if he got $10,000 or $20,000 as a "bonification," he would go back to Dubuque quite happy.

Q. 200. In that conversation what did Mr. Farley say had been promised him?

A. He didn't say that anything had been promised him.

Q. 201. What did he say on the subject of promises that he wanted put in "black and white;" what claim did he make?

A. That Mr. Kittson and Mr. Hill had promised to do something for him, and that he then wanted to know what they meant—wanted to have it definitely fixed.

Q. 202. Am I to understand that Mr. Farley's statement was simply the general one that Mr. Hill and Mr. Kittson had promised to do something for him, and he wanted that something made definite, or did he state what that something was? Please give Mr. Farley's language as nearly as you can or the substance of it.

A. He made no definite statement as to what he expected; and the impression made on my mind by the whole conversation was, as I have said before, that he would be highly satisfied with a gratuity of $10,000 or $20,000.

Q. 203. State whether you had any other conversations with Mr. Farley prior to his bringing suit, in June, 1879, in regard to any claim of his against Messrs. Kittson and Hill or any promises or agreement?

A. I do not remember having any conversation with Mr. Farley after his claim took a definite shape.

Q. 204. My question was, whether you had any conversation with him after the one you have last mentioned, and before he brought this suit against Messrs. Kittson and Hill, in June, 1879?

A. I do not remember of having any conversation with him after the one I have spoken of.

Q. 205. When did you first learn that Mr. Farley claimed to be entitled to share equally with Messrs. Kittson and Hill in the enterprise we have been speaking of, or its results?

A. I think I learned it first in the newspapers, at the time I was up there then, shortly after these foreclosures.

Sir Geo. Stephen's testimony was given at Montreal, May 31, 1888; Mr. Kennedy's at Berne, Switzerland, in the following September. To give the plaintiff all benefit of whatever variance there

is between their statements, we subjoin what was said by Mr. Kennedy on cross-examination, (1636:)

C. Q. 113. Did Mr. Farley then and there—I mean at the time when Mr. Stephen spoke about the directorship—state what he, Mr. Farley, wanted Kittson and Hill to do? or say that he wanted matters put in black and white as between himself and Kittson and Hill, or anything to that effect?

A. He did not, and I have no recollection of his saying anything as to his, Mr. Farley's, wanting matters put in black and white, or anything to that effect.

C. Q. 114. Did Mr. Farley, in your own and Mr. Stephen's presence, at any time say what he wanted of Kittson and Hill, or anything to the effect that he wanted his understanding or agreement with Kittson and Hill put in black and white, or anything to that effect?

A. Mr. Farley, in the presence of Mr. Stephen and myself, expressed himself indefinitely as to what his expectations were, but merely intimated that he always understood or had been led to believe that he was to have some small interest with Kittson and Hill in their shares in the venture. And, as I have already said, I have no recollection of his expressing any desire to have it put in writing, or, as I think the question says, put in black and white.

In his deposition in the *Sahlgard Case* in December, 1881, put in evidence here by the plaintiff, Mr. Kennedy had referred incidentally to a conversation in March, 1879, in which plaintiff had spoken to him "about an expectancy on his part that Kittson and Hill would give him some small interest in the stock of the company, after it was organized, in case they became owners of the property," but had not stated that he had a present interest or an agreement for an interest. (1748, Q. 27-8.) And in the same deposition he stated, on cross-examination, that in the conversation in March, plaintiff "then claimed that it had been long hoped by him, by reason of his relations with Messrs. Kittson and Hill, that he should have such an interest." (1763, C. Q. 54.)

When testifying in this cause, Mr. Kennedy was cross-examined as to these statements in his former deposition, claimed by plaintiff's counsel to be inconsistent with his testimony to the conversation with plaintiff in April, 1878. (1630-3, C. Q. 94-9.) Mr. Kennedy is undoubtedly correct as to the conversation in March, 1879, to which he testifies. Nor is there any doubt that Sir George

Stephen had with plaintiff the conversation to which he testifies. It is more than probable, however, that Sir George, having no accurate *data* by which to distinguish them, has, in his testimony, stated as *one* conversation what was in reality *two*, viz., a conversation in March, being that testified to by Mr. Kennedy, and a later conversation, just after the organization of the Manitoba Co., when plaintiff complained of being left out of the directory.

Mr. Stephen says he was in St. Paul May 23, 1879, when the Manitoba Co. was organized. (1260, Q. 198.) And it may well be that the later conversation was in Mr. Barnes' and not Mr. Kennedy's presence, Mr. Barnes having been in St. Paul at the organization of the Manitoba Co.; (Kennedy, 1602-3, Q. 13;) for Mr. Kennedy was in New York May 26, 1879, and wrote therefrom on that date, (Plff.'s Ex. 168, p 322,) that he was about coming to St. Paul. When he arrived at St. Paul, the plaintiff was absent, (as stated in his letter of the 29th,) and on his return, a few days later, he brought his lawyer with him, and, having looked at the matter "through a legal eye," as he told Mr. Kennedy, made substantially the claims stated in his complaint in the first suit. So that Mr. Stephen's interview with plaintiff in which the latter complained of being left out of the directory of the newly-organized company, could not have been in March, (before said organization,) nor could it have been in Mr. Kennedy's presence. It was entirely natural that Mr. Stephen, in his recollection of a conversation after nine years, should not remember accurately which member of the firm of J. S. Kennedy & Co. was present, and should think Mr. Kennedy instead of Mr Barnes was present at the conversation held just after the organization of the new company. And so there is nothing strange in his transferring to the May conversation some things that were really said in March.

And these minor errors in no way detract from the force of Mr. Kennedy's and Sir George Stephen's testimony to the material fact, viz., that in plaintiff's conversations with them in the spring of 1879, he made no claim of any contract giving him an equal or any interest with Messrs. Kittson and Hill, but merely that they had made him indefinite promises, or led him to have expectations, on

which he founded "claims" and which he wished made definite. And their testimony on this point entirely accords with plaintiff's letters to Mr. Barnes and to Mr. Kennedy, and entirely corroborates Mr. Hill's account of the evening interview—the only interview between him and plaintiff in which the subject was mentioned, and which was after May 23d, (as shown by the letter to Mr. Barnes,) and before the 29th (as shown by the letter of that date to Mr. Kennedy.

In this interview with Mr. Hill, it is true, plaintiff did not speak definitely of any promises, merely claiming that he was "entitled to consideration," and this because he well knew no promises had been made.

And besides corroborating Mr. Hill, this testimony of Mr. Kennedy and Sir George Stephen shows very clearly that while plaintiff did not claim that he was equally interested with Messrs. Kittson and Hill, or interested at all, or that he had any agreement with them or anything more than indefinite expectations, so when he wished to realize those expectations, wished a definite promise, he *did not apply directly to Mr. Kittson or Mr. Hill*, but resorted, *in the first instance*, to Mr. Kennedy, with a complaint "that it was evident now they were not going to do much, if anything for him," (Defts.' Test. Kennedy, 1599, Q. 13;) and not till after May 23d does he apply to Mr Hill, having, as he says, applied to Mr. Kittson not more than two days previously. And when Mr. Kennedy brought Mr. Stephen to him in March, he gladly accepted Mr. Stephen's offer to "leave the whole matter with him, and he would see that Kittson and Hill carried out any promises they had made or expectations they had held out to him." (Kennedy, 1600, Q. 13; Stephen, 1260, Q. 199.) And plaintiff himself says: "I looked to Mr. Kennedy largely to see me righted in this matter." (1399, Q. 215.)

Now, if in March, 1879, plaintiff supposed that he had made with Messrs. Kittson and Hill the agreement he now alleges, or any agreement, or that he had any definite promises from them, he could not have failed to state such agreement or such promises to Mr. Kennedy, the man to whom "I looked largely to see me righted," and to Mr. Stephen, the man whose proffered intervention

he had gladly accepted. He does nothing of the kind. "He didn't say that anything had been promised him." He said "that Mr. Kittson and Mr. Hill had promised to do something for him, and that he then wanted to know what they meant—wanted to have it definitely fixed. He made no definite statement as to what he expected; and the impression made on my mind by the whole conversation was, as I have said before, that he would be highly satisfied with a gratuity of $10,000 or $20,000." (Stephen, 1261, Q. 200-2.)

And he got no nearer stating or asserting any agreement of any kind to Mr. Kennedy, either at that time or when, later, on May 29th, he stated as his grievance Mr. Hill's ignoring "all my claims to share in the honors or profit to *some small degree.*" He tries to explain this by saying that "I learned from Mr. Hill in that interview that other parties had come into this scheme, you know, and, as a matter of course, I was always in favor of dividing it up into smaller parts than he was willing to—by fifths—and at that time I felt that I was willing to be governed by whatever was right under the circumstances—what Mr. Kennedy might think was right;" and he says he has no further or other explanation to make of his use of the expression in his letter. (1042, Q. 225-6.)

But plaintiff in his *original testimony* to the interview, says nothing of any such statement of Mr. Hill. He never supposed any such subdivisions had been made, for he alleges in his original complaint, as well as in his bill in this cause, that *the entire interest* was divided among and held by Messrs. Smith, Stephen, Kittson and Hill. And while the proof in this case shows (as was alleged by the plaintiff in his original complaint) that Messrs. Kittson and Hill had each one-fifth, yet this, according to plaintiff's and Fisher's present testimony, was in entire accord with the alleged agreement, and was no reason whatever for plaintiff being asked or consenting to take less than the agreement gave him.

And plaintiff does not undertake to say what other parties Mr. Hill told him had come into the scheme, nor why his own share should be reduced on that account. His testimony in atttempted explanation, if true, explains nothing. He does not and he cannot reconcile that letter and the letter to Mr. Barnes, and his talks

with Mr. Kennedy and Mr. Stephen, with the existence of the agreement to which he and Fisher have sworn in this case.

And this same question was put to him soon after May 29, 1879. He returned to St. Paul in the early days of June, a few days after Mr. Kennedy's arrival, bringing a lawyer with him from Dubuque, and met Mr. Kennedy by appointment at the latter's room at the Merchants' Hotel. Mr. Kennedy thus describes the interview, (1601, Q. 13:)

"He spoke to me in rather severe terms of the way in which he had been or was being treated by Kittson and Hill; said he was just as much interested in the enterprise as they were, and claimed that the question was not whether he was equally interested with them, but whether he was not entitled to one-third of the whole thing, on the strength of some previous talk or arrangement with Kittson and Hill, before any other parties were brought into it. He claimed that he had been the brains of the whole concern; that it was his scheme; that he got it up; and I think he added that they never would have had anything to do with it but for him. I asked him if he had any writing or agreement, regarding what he claimed, and he said, "No, it was all talk." I asked him how he could reconcile the claim he now made, or the interest he was now asserting to me he had in the enterprise, with the statements he had previously made to me, especially in the month of March preceding, and with his letter which, had just received a few days previously. He replied that he had been consulting his lawyer, who said he had a good claim, and that he had not had the benefit of having the matter looked at through a legal eye before. I asked him what he meant by "some share in the honors" referred to in his letter. He replied that Mr. Stephen had intimated to him that he would make him a director in his new company when organized, but had not done so."

And then Mr. Kennedy pointed out to him that as receiver of the Extension lines, which were yet to be sold, he could not be a director. (1601.)

In his deposition in the *Sahlgard Case*, which the plaintiff has here put in evidence, Mr. Kennedy gives the same account with that above quoted of his interview with Mr. Farley, and says it was "about the 5th or 6th of June." (Plff.'s Ex. 245, pp. 1748-1751, Q. 29-36.)

It will be observed that when questioned by Mr. Kennedy as to

his expression "all my claims to share in the honors or profit to some small degree," within a week after his letter was written, plaintiff has nothing to say about learning from Mr. Hill that other parties had come into the scheme, or his willingness to divide it into smaller parts. His only explanation is that when he wrote the letter "he had not had the benefit of having had the matter looked at through a legal eye," or as Mr. Kennedy puts it in his deposition in the *Sahlgard Case*, (Plff.'s Ex. 245, p. 1750, Q. 29,) "he had not had the benefit of looking at it through a legal eye."

Having looked at it through a "legal eye," the plaintiff brought his suits, made the various conflicting pleadings and affidavits, and, aided by Fisher, gave the testimony much of which they have had to take back, and substantially all of which we have shown to be untrue.

The Bringing of the Suit.

About a week after his last talk with Mr. Kennedy, the plaintiff brought his first suit. It may be claimed that his promptness—not to say his precipitancy—is an argument that he at least believed he had an agreement with the defendants—just as to some minds the fact that a man sues for millions goes to show that he must have some sort of a case, while to the same persons a suit for hundreds would have no such presumption in its favor. Even if such circumstances would ever afford any basis for an inference in the plaintiff's favor, such inference would in this case be overthrown by the means used by plaintiff to sustain his case, and the impossibility of the case itself in its final shape.

But we submit that plaintiff's haste in suing—his suing just when he did and as he did—shows that he meant to levy blackmail from Messrs. Kittson and Hill, and not that he has ever believed he had made any of the differing agreements to which he has successively sworn.

If he honestly thought he had made the agreement, and that he was an associate with the four or with Messrs. Kittson and Hill, he would have known that his interests were bound up with theirs in the success of the enterprise. On June 13th all the property of the First Div. Co. had become vested in the Manitoba Co. under dec-

retal sales made and confirmed in the state court, and the decretal sale of the Extension line and land grant, of which he was receiver, was to take place on the following day, June 14th. All this he states in his complaint in his first suit. (Defts.' Ex. 164, p. 1571.) And the fact that this last sale did take place on June 14th, and was confirmed on the 21st, is recited in the order of the circuit court of June 23, 1879, (introduced as Plff.'s Ex. 209, p. 449,) requiring the receiver to turn over the property to the Manitoba Co. as the purchaser.

The counsel in St. Paul employed by plaintiff were the same who were already employed by Sahlgard and others in suits to set aside the First Div. sales for alleged frauds, (Farley, 1388-9, Q. 170-175;) and if plaintiff did not already know it, they knew perfectly well, and Mr. Griffith his other counsel, whom he principally consulted, (1389, Q. 177,) knew perfectly well, that if the receiver were interested in a purchase of the Extension lines, the court, on that fact being made to appear at any time, would refuse to confirm the sale, or would set it aside after confirmation, without further inquiry. And it was their duty to tell their client this, and they doubtless did tell him, as Mr. Kennedy had, in effect, already told him, and as he should have known, and probably did know, without any telling by anybody. By bringing his suit and giving publicity to it before confirmation of the sale, he would run the risk of its being brought to the notice of the circuit court, and thus endangering the purchase of the Extensions, with no compensating benefit to his suit.

And if he had or thought he had a good case, what need of such haste or of immediate publicity? The court was about to convene, and did convene on the third Monday, (June 16th,) and on the 21st the sale was confirmed. By waiting until after the 21st plaintiff would in no way prejudice his case. And the law required no publicity at that stage of the suit. He was not obliged to *file* his complaint. It was enough for him to serve a copy of it with the summons. He would have preserved every right by waiting till the sale was confirmed and then bringing suit quietly, trusting to the goodness of his cause. And by proceeding thus he would endanger no more than was un-

avoidable the enterprise in which he says he considered himself so largely interested, and on the success of which the value of that interest depended. If he were suing because he thought he had a good contract, which he wished to enforce, he would have waited till after the confirmation of the sale, and then have kept the suit as quiet as he could.

But if he knew that he had no contract to enforce—no interest in the enterprise: if he had had only vague expectations,—whether well or ill-founded—and proposed, not to enforce an agreement, but to take advantage of the associates' position to extort money from their necessities and their fears, he would pursue a very different course—a course that should menace the success of their enterprise. His suit would be a renewal of the threat made to Mr. Hill that unless they recognized his "claims" they should not get the receiver's line except at a vastly increased cost. And he would thus extort from them, not satisfaction of a contract, but payment of blackmail. If he could compel a cash payment, what was it to him that the enterprise was embarrassed? That, like the enterprise becoming a "Canady project," "would be a matter of no moment to you or me, if we could make some money." And by bringing the suit—though only against Messrs. Kittson and Hill—as he threatened the whole enterprise, so he would make the other associates to bring such pressure on Mr. Hill as should compel him to cease his opposition.

And for such a suit as this, time was of the essence. After confirmation of the sale, and the safety of the enterprise assured, the associates would not heed his threats. Hence he must sue at once, and he must make his suit public—and also employ the counsel at St. Paul who were already bringing, on behalf of Sahlgard, a hostile suit against the associates.

Accordingly he does all of these things. He employs the counsel already acting in hostility to the enterprise. He brings his suit June 13th, the day before the sale of the Extension line. He files his complaint, and the newspapers of course published it.

One step he did not take. He did not bring his suit in the circuit court. If he had, Judge Dillon could not have failed to take notice of it. So long as he sued in a state court, on the associates coming to terms with him, he could dismiss his suit; say it was all a

misunderstanding, "that the original complaint was drafted in a hurry, without the presence of the plaintiff, and without a full comprehension (by his counsel) of all the facts," as he actually does swear in his affidavit on motion for leave to amend in the state court. (Plff.'s Ex. 243, p. 1737.) But to bring his suit in the circuit court would be to burn all his bridges, and he dared not come with his complaint before the judge whose confidence he says he had betrayed.

But his expectations were again disappointed. Messrs. Kittson and Hill and their associates treated his demand as they had treated the like demands of Knuppe for $25,000 and of plaintiff's friend Carp for "$200,000 common," and as they were treating that of Sahlgard. They bought the Extension lines, had the sale confirmed, and successfully defended suits and other proceedings to set it aside for alleged frauds on the outside bondholders.

But if plaintiff brought his suit for blackmail, why did he not drop it when he found the associates would not submit to extortion?

His character and subsequent conduct, as exhibited in the progress of the cause, and already commented on, are a sufficient answer. In bringing his suit in the first place, he knew perfectly well that he could not make the vague expectations he had entertained, or his own high opinion of the services he had rendered, the ground of a suit. He had to sue on a contract, and he must find a contract to sue on. To dismiss his suit was to acknowledge his defeat, and abandon his last hope of recognition for his claims. And there was a chance—perhaps more than a chance—of success. He had his correspondence with J. S. Kennedy & Co., through which he was familiar with one stage of the negotiations for the bonds; other information he had got from Carp and Knuppe. And he did not know how much had been done by the associates of which Kennedy & Co.'s letters made no mention, and of which he was perforce ignorant—an ignorance incredible in an associate. He did not know the breadth and depth of his own ignorance, nor anticipate how that ignorance would be exposed. He had kept no copies of his own most damaging letters. He doubtless expected that the case would come to a mere question of oral testimony between Mr. Hill and Mr. Kittson on the one side, and himself and the faithful

and "disinterested" Fisher—both corroborated by the correspondence with Kennedy & Co.—on the other. He doubtless rated highly his own ability and equipment for such a contest—for he is not the man to do himself less than justice in anything. And in Fisher, brought up under his own eye, and his right-hand man—his *alter ego*—for many years, he doubtless had that confidence as a zealous coadjutor which Fisher has so fully justified—although he could have hardly anticipated that even Fisher would prove able, by mere swearing, to fasten upon Minnesota the seasons of the antipodes.

A suit of such a nature, on such testimony, need not be very costly. And arrangements might be made by which this burden might be divided, and the heaviest charges be made contingent on success.

And then there was always the chance that to avoid the effect of this suit on the Shalgard and other suits, or to get rid of it, the defendants might "come down" with something handsome.

And possibly the course of the defendants in first demurring, and then interposing a plea, may have given the plaintiff confidence—led him to think they would after all do something for him rather than fight to the end.

If a man's motives and purposes in bringing a suit or in anything else can ever be judged by his prior and his subsequent conduct, by full disproof of his pretended cause of action, by the claims and threats he made before suit, by the circumstances in which the suit was brought and the time and manner of bringing it, by his shiftings of ground in his pleadings and his evidence, by his contradictory falsehoods, and his evident willingness to swear to anything that will help his claim—then the circumstances preceding and attending this suit compel the conclusion that the plaintiff brought and has prosecuted it under no honest mistake as to his rights, but with full knowledge of the falsity of his claim. And if haste in bringing a suit, or the bringing of a suit for millions, is ever ground for an inference that the plaintiff may have or think he has a just claim, or can ever have any weight whatever as against facts established by unimpeached testimony, the plaintiff himself has ably and successfully rebutted any such inference.

General Observations on the Evidence—Reply to Plaintiff's Criticisms.

The plaintiff, founding his suit on an alleged betrayal of trust, suing for millions on an alleged parol agreement that nobody ever heard of but himself and Fisher, laboring to prove by his oath as a witness that he was false to his oath as receiver, comes into court discredited at the outset and staggering under a tremendous burden of proof. How he has sunk under that burden has been already pointed out. If the evidence for defendants were stricken from the case, the testimony of plaintiff and Fisher, self-contradictory, more than once confessedly false, wanting in everything that would win or compel belief, is wholly insufficient to make out the agreement sued on, an agreement in itself improbable, and the date of which the plaintiff, after much experimenting, cannot locate within any period of six months.

The discussion of that evidence has already been perhaps more full and minute than its claims to credence warranted. And the work thus devolved upon us has been not the common task of separating truth from falsehood, but of analyzing a mass of falsehoods into its ingredients,—its separate false statements; showing not merely the falsity of each statement, but from what material it was constructed, with what motive, and for what purpose.

And little, if anything, needs to be added by way of comment on the evidence for the defendants, already stated in detail as we have progressed, step by step, in the true history of the transactions which began with Mr. Donald A. Smith's suggestion in the winter of 1873-4, and culminated in the acquisition of the property of both companies in June, 1879. The groundwork of that narrative is of course the testimony of Mr. Hill. The lamented death of Mr. Kittson has deprived us of his testimony in direct denial of the principal interviews alleged by plaintiff—those in which the pretended agreement was made and the antecedent negotiations had, and of those later interviews added as embellishments to the substance of plaintiff's story. In the actual transactions Mr. Kittson at no time took an active part, and as to these the evidence is full and sufficient. And Mr. Hill's narration, in itself clear,

straightforward, consistent alike with itself and with every undisputed fact, is corroborated by that of the other actors in the transactions, Sir Donald Smith, Sir George Stephen, Mr. Galusha and Mr. Kennedy; by the men who from their relations with Mr. Hill were in position to know and did know what was actually done, Mr. Newel, Mr. Upham and others. Comment on the effect of this corroboration is needless. The witnesses need no introduction to the court, no assurances of their uprightness, their intelligence, or their reputation among their fellow men. Their testimony is before the court, and speaks for itself.

And men could not for years be engaged in such transactions—plaintiff could not for years hold the relations he did with J. S. Kennedy & Co.—without making writings embodying their agreements, recording their acts, exhibiting their plans and purposes, showing their relations to each other and to the enterprise. And these contemporaneous writings, of unquestioned authenticity, which do not lie and cannot be mistaken, whose testimony is free from errors of defective memory and is warped by no temptations to falsehood—this documentary evidence, (and in notable instances the very letters produced by plaintiff himself to break down Mr. Hill,) is not only entirely consistent with Mr. Hill's testimony, but supplements and reinforces it, and corroborates it at all points—sometimes where corroboration could hardly be expected. And this documentary evidence shows that plaintiff was not and could not have been an associate; was not regarded as such by Messrs. Smith, Stephen, Kittson or Hill, or by himself: and on this point his own correspondence with Messrs. J. S. Kennedy & Co. should be conclusive.

But as Mr. Hill's testimony was assailed at all points by an unsparing cross-examination and by the introduction of documents to contradict or impeach him, and as numerous criticisms were made in argument in the circuit court, and may be repeated here, upon the testimony of all of the defendants' witnesses, it may be well to notice a few of those criticisms.

The Red River Transportation Co. was organized by articles filed in February, 1874. (Plff's Ex. 242, p. 1732.) Mr. Hill cannot

recollect the date, but puts it in 1873. Mr. Galusha, who drew the articles, puts it in June, 1874.

Mr. Hill incidentally stated that he thought the Western R. R. matter was in the fall of 1874 or 1875. Plaintiff introduced the articles of incorporatiou, made in January, 1874. (Plff's Ex. 241, p. 1730.)

Plaintiff testified that he called on Mr. Hill at his house on Dayton Bluff, on business connected with the bond purchase. Mr. Hill testified that plaintiff made but one call on him there, on a Sunday, to ask him to become a bondsman in some suit. (694-5, Q. 623-4.) He lived on Dayton's Bluff from October, 1875, till January, 1878. (754-5, C. Q. 399, 400.) He does not profess to fix the exact date of plaintiff's visit, but puts it in the fall of 1875 or 1876, and afterwards as probably in 1876. Plaintiff then introduces a bond signed by him in an injunction suit by the receiver relating to some iron, made in August, 1875, when Mr. Hill did not live on Dayton's Bluff. (Plff.'s Ex. 210, p. 947.) But while Mr. Hill remembered but one bond, (he would not be entrapped by C. Q. 504-5, pp. 772-3,) he remains confident that plaintiff's sole call was to ask him to sign a bond. And a letter from plaintiff to Kennedy & Co., on Tuesday, Dec. 21, 1875, (Plff.'s Ex. 40, p. 216,) shows that he had that day induced "our friends here," (which in these letters always mean Kittson and Hill,) to agree to sign an additional bond in the iron suit. A Sunday visit to Dayton's Bluff is perfectly consistent with seeing Mr. Kittson and perhaps Mr. Hill on Tuesday, and getting "our friends here to agree to go upon a bond" on that day.

Mr. Galusha's recollection of Mr. Kittson's enterprise goes back no farther than March, 1876—a date, however, earlier than the pretended agreement. When examining him, and in the argument, counsel labored to show that his opinion could not have been written prior to April, 1876, or taken by Mr. Hill to Ottawa, in March, 1876. But plaintiff's latest theory (in the circuit court—we cannot anticipate what new ground he may take) would work better if Mr. Hill had taken the opinion, had had something to show Mr. Smith. (See pp. 90-1, 121-2, *supra*.)

Mr. Upham was criticised (1) because after 13 years he could not give *verbatim*, or with specifications of time and place, conversations of almost daily occurrence, running through two years; and (2) because, finding in plaintiff's testimony statements he knew to be false, (among them that this enterprise originated with plaintiff in 1876,) he looked up evidence in his possession for the benefit of his friends' Messrs. Hill and Kittson.

As to plaintiff getting information from Mr. Upham about prices prior to March, 1876, see pages 37 and 83-4, *supra*.

Sir Donald Smith, on the other hand, was objected to because he did not make researches before testifying, and was criticised because he could not repeat *verbatim* conversations occurring many years ago, and had not kept in his memory the details of a transaction closed ten years before, or collateral matters, as to some of which, at least, he had merely general information. His answers to Q. 26 and 27 were passed over. He was charged with inconsistencies in his statements as to division of interests, (as to which, see however, page 163, *supra*;) and a small extract was made from his testimony to show want of a positive denial of knowledge that plaintiff was an associate, as to which see pages 133-8, *supra*. And see 1182, C. Q. 168-9; Stephen, 1234, Q. 57; 1243, Q. 108-9. And his positive statement, 1260, Q. 96-7. If Mr. Smith had known anything of any interest of plaintiff, Mr. Stephen must have known it.

He has little recollection as to the Breckenridge-Barnes link or who built it, or when, or other matters connected with the scope of the articles of the Red River Valley R. R. Co., or of the Western R. R. Co. And counsel well argued that his ignorance or forgetfulness of those matters showed that *those* and not the acquisition of the First Div. and Extension properties were the object of the enterprise originated by him in 1873, and prosecuted under his direction by Messrs. Kittson and Hill, (aided at the outset by information received from Mr. Delano,) in 1874-5.

He knew nothing of the first proposition to Carp--to buy the First Div. lines; but this negotiation was outside of his plan and was never reported to him. See page 91, *supra*, & fs 140.

It was objected that he told Mr. Hill in March, 1876, to get prices of bonds, when he had said he already had them. He already had market prices of outstanding bonds and of certificates and requested Mr. Hill to find out what the committee would sell for. See page 91, *supra.*

He not merely "admits" that he had the Delano speech. The statement is on *redirect* examination (1218, R. Q. 19,) and the speech is Defts.' Ex. 120; p. 1273.

He certainly does not "substantiate" what counsel call "Delano's scheme." It might aid the investigation if counsel would give an intelligible statement of what the scheme was.

Sir Geo. Stephen's variance from Mr. Hill in the date of the May, 1877, meeting at Montreal has been remarked on in the account of that meeting. He *was* able to give the date when plaintiff advised him of the folly of his enterprise, viz: during his visit to St. Paul in the summer of 1878. See page 198, *supra.*

In quoting from *Mr. Newel*, counsel omitted C. Q. 4, 5 and 6, (p. 1328,) and also Q. 15, (p. 1320.)

As to the examination of the printed records and book of mortgages, brought by Mr. Young in April, 1875, see pages 75-77, *supra.* He identifies the book of mortgages; whether the identical copy is immaterial, (1322, Q. 20; 1342-3, C. Q. 96-105.)

He did not know what was Mr. Delano's scheme for acquiring the *First Div.* Branch Line, or whether there was any. Nor does it appear that there was. Neither his speech (relating only to a forfeiture of the Extensions,) nor the Western R. R. Co., is in any way concerned with the Branch or Main line of the *First Div.* Co. The supposed Branch Line scheme of Mr. Delano (if he had any) remains as great a mystery as ever.

In any case written *memoranda* procured for clients would hardly be preserved by either partner years after dissolution of the firm; certainly not that part afterwards obtained in print

Young & Newel's books contained no entries of proceedings in the foreclosure or other suits till 1878. But they were not engaged in those suits until the associates bought the bonds in 1878.

They made no charge in their books for services until the final settlement made in May, 1880. They gave credit for two sums in

1879, and charged some expenses in 1878. *Ergo* (say counsel) they were not employed by the associates, or any of them, nor was there any enterprise going on, prior to that date.

Mr. Kennedy has absolutely no interest in this suit. The Manitoba Co. can be liable and a proper party defendant only in respect to the alleged undivided profits in its hands when the suit was brought, and it is a matter of indifference to it to whom these profits are awarded. In issuing plaintiff's proportion (if any) of the stock to Kittson and Hill, it did what must have been intended by the parties, if the agreement was made, and plaintiff does not dispute this.

Mr. Kennedy forgot the letter of his firm to plaintiff of Feb. 27, 1878. (Defts.' Ex. 48, p. 994.) But the letter was written by *Barnes*. (Nichols, 958-9, Q. 20.) As to that letter, and the expression "future success of this enterprise," etc., see page 172, *supra*.

And, generally, we concede that no one of the witnesses for the defendants has shown the phenomenal "recollection" exhibited by Fisher. But (parodying the pithy saying attributed to Mr. Lincoln:) "I'd rather not remember so much than remember so many things that ain't so."

In the circuit court, counsel commented on the non-production of any of Mr. Kittson's correspondence. Their anxiety for this and other correspondence is exhibited by the steps they took to obtain it on the day (October 13, 1888,) they finally closed their testimony, the case standing for argument (and being argued) at the opening of the ensuing term—on December 14, 1888. (1692-4, 1696-1700.)

It was also argued that having called plaintiff, after he had been examined as a witness for himself, the defendants are conclusively bound by his statements, even though proved to be false, and cannot attack them. As to this, however, see *United States* v. *Rudd*, 144 U. S. 154, 165-6. On that examination most of the statements by which counsel claims we are bound, were volunteered by plaintiff and were not answers to any questions. And the strongest contradiction and impeachment of plaintiff are his own testimony and his own letters.

Questions that should be Answered.

In the course of the argument, we have suggested several questions arising on the evidence, which it seems incumbent on plaintiff to answer. Lest they be overlooked by counsel or the court, we here collect a few of them with some others:*

Why is it that no one can be found, except plaintiff and Fisher, who ever heard of the alleged agreement or of plaintiff's alleged interest? That Messrs. Smith and Stephen, with whom he says in his bill he was an associate, never heard of it? That Mr. Galusha, Mr. Kittson's representative and attorney, never heard of it? That Mr. Barnes, with whom plaintiff was so intimate, and to whom he wrote about bond speculations, never heard of it? And especially why was it not used as an argument to induce Mr. Smith to come in? (*Supra*, 133-8.)

Why is it that plaintiff never knew and never asked the terms of the agreement with Messrs. Smith and Stephen on which both the fact and the *quantum* of his own alleged interest depended? (*Supra*, 21-2, 180.)

Why did plaintiff tell Mr. Kennedy in April, 1878, that he had had a chance to get an interest which he had not accepted, but thought he could get renewed? Why did he ask Mr. Kennedy's advice, and finally say he would let the matter drop? (*Supra*, 188.)

When he got Kennedy & Co.'s letter of March 9, and Mr. Kennedy's letter of April 4, 1878, telling him that Messrs. Hill and Kittson did not mean to supersede him, why did he remain silent? Counsel argued that the last letter was well calculated to deceive. (But see *supra*, 174, 185-8.)

When, in the spring of 1879, he gladly accepted Mr. Stephen's offer to have Messrs. Kittson and Hill make good any promises

* See also *supra*, pp. 61, 97, 119, 122-3, 125-6.

they might have made, why did he not tell Mr. Stephen that he had a contract for an equal interest with them? Why did he leave Mr. Stephen to infer that a gift of $20,000 would send him off to Dubuque quite happy? (*Supra*, 238-9, 242-3.)

After the organization of the Manitoba Co., (May 23, 1879,) why did not plaintiff, in his letter to Barnes, mention his contract and his interest, and express an intention of enforcing it—instead of merely complaining that inferior men were preferred to him as directors, and that his "claims" were ignored, and threatening revenge—to "get even with Jim Hill before I leave here." (*Supra*, 150, 230.)

In his letter of May 29, 1879, to Mr. Kennedy, the man to whom "I looked to see me righted," why is he silent as to his contract and his interest? Why does he merely complain that Mr. Hill persists in "ignoring all my claims," and why does he describe those claims as "claims to share in the honors *or* profit *to some small degree?*" And why his threat that Mr. Hill "may have cause to regret it?" And was not this a threat to block the purchase (yet to be made) of the lines of which he was receiver?—the same threat he made to Mr. Hill. (*Supra*, 151, 229, 230-6, 244.)

Why did the associates, beginning with Mr. Hill's letter of Aug. 23, 1877, to Mr. Stephen, (*supra*, 154,) down to the completion of the enterprise, at all times regard and treat plaintiff simply as receiver, general manager, and agent of J. S. Kennedy & Co? Why did they continuously resort to J. S. Kennedy & Co. to obtain from their "associate" compliance with their wishes? (*Supra*, 184-6, 191, 195-8.)

Why is it that *during the most active period of the negotiations*, and during the prolonged absences of Messrs. Kittson and Hill, they never wrote a line to the plaintiff, nor he to them? On Mr. Hill's visit to New York in June, 1877, his and Mr. Kittson's

absence from Sepr. 6-22, 1877, (*supra*, 156-8, 160-1,) during which they negotiated at Montreal and visited Litchfield; on their visit to J. S. Kennedy & Co., in November, before Mr. Stephen's return; on their visit to Montreal and New York in December, 1877—January, 1878, (*supra*, 165-7,) when the new project was formed and negotiations had,—why did they not send to Mr. Farley a single letter or a single telegram, either asking advice, or asking assent to the changes and propositions they were agreeing to or making, or giving him any information? And Mr. Kittson, who rained confidences on Mr. Farley in St. Paul, and who was absent from the middle of July until September, 1877, and from the end of January to March 16, 1878, (*supra*, 137,) why did he not send to Mr. Farley a single line either asking advice or information, or expressing distrust of Mr. Hill, or telling things he did not wish Mr. Hill to know? (*supra*, 234.)

Had Mr. Kittson, in *July, 1877*, already begun that course of deceiving the plaintiff, so steadily pursued (as was claimed in argument) after January, 1878?

Why did he write on Oct. 23, 1887: "I hold Comittys Certificates for 25250$, 1,200,000 Branch Loan bonds, which I authorized Knuppe to say to Mr. Carp might go in with sale, but at that time *I understood the offer* to buy this Class Bonds to be 80 cents. *They* have reduced the price to 75—and *I learn they advertise* to take up certificates at a still less price," etc.? (*Supra*, 148, 162.)

Why is it that plaintiff's knowledge of the doings of the associates is limited to what is told him in the letters of J. S. Kennedy & Co.? And why did he resort to them for information?

Why did he write to J. S. Kennedy & Co., on Sepr. 26, 1877, after Mr. Hill's return to St. Paul from the conference at Montreal, "I know nothing about the progress being made to change ownership and control of property out here?" (*Supra*, 148, 158.)

Why was it that, when he returned from Dubuque to St. Paul, on Feb. 14, 1878, and read in the newspaper article of Feb. 12th that

the purchase of the bonds was as good as made, and although Mr. Hill was then in St. Paul, and had been for a month, he wrote on Feb. 15th to J. S. Kennedy & Co.: "Would it be asking to much of you to give me a short condenced statement of the contract Between the Dutch Bondholders and Hill, Kittson & Co. How many of each kind of Bonds do our Friends get, price of each, and *how* and *when* do they pay?" (*Supra*, 149, 170.)

And on getting an answer, why did he write, on Feb. 22d, for further information: "I would be pleased to have your understanding of the contract as to the Number of bonds of each Isue Mess. Hill and Kitson and their associates are under obligation to take under the arrangement. You will understand the Drift of my Inquiries. It has been more than intimated to me that Mess. H. & K. would be pleased *to make me interested* in their Shares of which may result from this trade?"

And if he was one of the parties who had agreed or offered to buy the bonds at prices named, why should he add: "My judgment is some of these Bond is cheap at the price named, and others *very much higher than I would pay?*" (*Supra*, 149, 171.)

In his testimony on the plea, (quoted p. 1389, Q. 178,) the plaintiff, in answer to a question by his own counsel, explained this letter by saying he "was very desirous of getting Mr. Kennedy's consent without letting him know that I was actually one of the parties who carried on all the negotiations; and, should he have objected to it, I might have withdrawn without his knowing anything about it." If plaintiff still stands on this explanation, (which is hardly in accord with his statement in his original testimony that he never wrote any misleading letters to Mr. Kennedy or his firm.—163-4, C. Q. 248-251; and see 1390, Q. 179,) then we ask:

What sort of a contract was it from which the plaintiff could withdraw at pleasure?

And, if, as plaintiff says, his own connection with the enterprise was conditional on his getting Mr. Kennedy's consent, and if, as he also says, Mr. Kittson made his joining and continuing in the enterprise a condition precedent to his own joining in it, then we ask:

Why did plaintiff never tell the defendants that his own connec-

tion with the enterprise was conditional on Mr. Kennedy's consent?

And why did he permit them to bring in Mr. Smith and Mr. Stephen, and negotiate for nearly two years, and made great outlay of time and money, and incur obligations (by their offer of Jan. 5, 1878,) amounting to millions, *before taking the first step* toward getting Mr. Kennedy's consent?

Why did he resort to Mr. Kennedy to impart information to the associates as well as to obtain it from them?

In November, 1878, when he announced that he could not continue as manager, and suggested that the associates look about for his successor, why did he tell this to Mr. Kennedy, and request him to impart it to the associates? (*Supra*, 200, 201.) And this, too, when it was considered that the enterprise would be "folly" unless plaintiff should continue manager after the property should be acquired, and the enterprise was agreed to and undertaken on that condition? (*Supra*, 43, 49.)

If plaintiff could retire at any time, what was there in any part of the alleged agreement that was binding on any one?

Why did plaintiff in June, 1878, refuse to go on with the work, without J. S. Kennedy & Co.'s guaranty that the associates would fulfil their agreement with the court to furnish the money? (*Supra*, 193.)

If he was an associate,—and especially in a project of his own devising,—why did he tell Mr. Stephen, in the summer of 1878, that he was throwing away money by completing the St. Vincent Extension? That the road would not be needed for 20 years? (*Supra*, 198.)

Why did plaintiff go into private bond speculations?

On the various occasions when important steps taken in the negotiations had become known to the plaintiff through Barnes or Knuppe, why is he found writing letters to Barnes proposing future bond speculations, or in regard to his own private bond speculations already undertaken?—as in his letter of June 3, 1876, (after

the negotiation with Barnes;) in letter of Aug. 23, 1876, (after the telegram to Barnes of Aug. 16th, and Barnes' letter of Aug. 17th;) in letter of October 23, 1877, (when it was supposed that a cash purchase had been closed in London;) and in the letter of March 9, 1878, just after he had learned from Barnes' letters of Feb. 18th and Feb. 27th of the terms of the bargain that had been closed? (*Supra*, 205-8.)

Are these the letters of an *associate?* or of one *not* an associate, who had bonds to sell; who was speculating on the enterprise of others?

If there was any agreement, and if plaintiff was or meant to be honest with the bondholders he represented or with the court, why did he conceal his interest from J. S. Kennedy & Co., and from the court?

During all the negotiations, and when J. S. Kennedy & Co. were relying on his advice in agreeing to prices, why did he profess to be merely the representative of the bondholders?

And why did he write so late as Feb. 22, 1878, that he had merely an offer or intimation that defendants would be pleased *to make* him interested?—in effect saying that he had never been interested, and had but just received the offer of some interest in the result. (*Supra*, 149, 171-3.)

Why did he disparage the property in the letter to Carp of Jan. 29, 1877? (*Supra*, 140.)

Why did he in effect represent to Judge Dillon's commission, and to the judge himself, that he was not interested in the purchase of the bonds? (*Supra*, 188-9, 192.)

Why did plaintiff and Fisher, in their original testimony, swear over and over again to details of time, place, circumstance, and language, confessedly false, and which they must have known to be false, and which their own counsel admit to be false? Why did plaintiff persist in those falsehoods after the truth had been brought to light by defendants' witnesses and until advised that they ruined instead of helping his case?

Why did they try to supplement J. S. Kennedy & Co.'s letters by the story of sending a man to Holland? (*Supra*, 55-6, 127-131.) The story of conversations with Mr. Kittson about a newspaper article (*supra*, 174,) and about an invitation to go to New York, (*supra*, 177,) both at a time when Mr. Kittson was in New Orleans? By the story of Mr. Kittson's asking plaintiff to go to New York to negotiate with Litchfield, when Mr. Kittson knew that a settlement had already been made? (*Supra*, 211-225.)

Why did plaintiff make Mr. Kittson give as an excuse for lessening his share, the fact that *at one time* Messrs. Kittson and Hill had *unexpectedly* been required to furnish money, when Mr. Kittson knew (as plaintiff would have known had he been in any way interested) that he was continuously called on to furnish money, and this in pursuance of his own and Mr. Hill's contract with their associates? (*Supra*, 225-6, 227, 182-3.)

Can a recovery be had in such a case as this—or in any case—on the sole testimony of such witnesses—contradicted, too, at every point by men of the highest integrity and intelligence, and by contemporary letters, records, and documents that do not lie?

And was there ever a fitter case for the application of that "principle as old as the hills, and which ought to be as eternal in the administration of justice, that the presentation knowingly of fabricated papers or false evidence to sustain the story of a party throws discredit upon his whole statement. It is generally deemed equivalent to an admission of the falsity of the whole claim."

Per Field, J., in *Sharon* v. *Terry*, 36 Fed. Rep. 337, 368

THE LAW OF THE CASE.

If the court should find that the interview between plaintiff and Messrs. Kittson and Hill actually occurred, (whether in the autumn or the spring of 1876, or at any other time,) and that the plaintiff's and Fisher's testimony as to the conversation at that interview, and the other evidence relied on by plaintiff to make out his contract, is entitled to belief, then we say that, giving such evidence full credence, and giving plaintiff the benefit of every inference in his favor, he is not entitled to relief, for these reasons:

(1.) That he has failed to make out any case whatever against the defendants.

(2.) That if he has made out any case at all, it is one of legal and not equitable cognizance.

And we submit and shall argue the following propositions:

1. The plaintiff has failed to prove any agreement at all between himself and the defendants Kittson and Hill to undertake the purchase of the bonds.

2. Even if any valid agreement was made between the plaintiff and the defendants Kittson and Hill, still the latter made with Messrs. Stephen and Smith an agreement, and engaged with them in an enterprise, to which the plaintiff never was *in fact* admitted as a party. He was never a member of their association, and therefore never obtained any interest in any of the bonds or property acquired, or in any of the profits realized by that association, nor in the defendants' share of those profits.

3. The association formed by the defendants Kittson and Hill with Messrs. Smith and Stephen was not an association contemplated by or within the scope of any agreement with plaintiff, nor for an enterprise contemplated by or within the scope of any agreement with plaintiff. And the association was formed after the alleged agreement and the enterprise therein contemplated had proved abortive.

4. As the original enterprise proved impracticable and abortive, the defendants did not incur any liability to plaintiff, either by failing to carry out that enterprise, or by engaging in the different enterprise in which the profits here involved were realized.

5. Even if the original agreement and the contemplated enterprise had not proved abortive; even if the enterprise undertaken and accomplished was one contemplated by the original agreement —one into which the plaintiff might have been, and, under the terms of that agreement, should have been admitted as an associate, still, as the plaintiff was not admitted to it, his only remedy is by action at law for breach of the agreement to form an association which should include himself.

Propositions 2, 3, 4 and 5 will be considered together.

6. The alleged agreement was illegal, and hence no contract ever existed between the parties.

I. THE EVIDENCE FAILS TO SHOW AN AGREEMENT.

According to plaintiff's and Fisher's testimony, Mr. Kittson, with Mr. Hill's concurrence, represented that Messrs. Smith and Stephen could be induced to furnish the money needed for a cash purchase of the bonds. But they did not *contract* that those gentlemen *should* do so, nor even that they would make any effort to induce them to do so.

If Messrs. Kittson and Hill, the next day after the interview, had refused to take any steps—and had never taken any—to procure the aid of Messrs. Smith and Stephen, and had never done anything toward the purchase of the bonds, the plaintiff would have had no cause of action against them.

The plaintiff says in his bill he was "to furnish such facts, information, and advise, and render such aid and assistance, as should be required of him." The *testimony* does not show that he *contracted* or *promised* to do anything. Mr. Kittson said he would be needed to tell them what to pay for the bonds, and to manage the property after it was acquired. But he did not bind himself to do either. He, too, could the next day have repudiated the whole scheme, and the others would have had no cause of action against him.

According to Farley's and Fisher's testimony, the one thing that was agreed on was that the plaintiff should *not* be obliged to furnish any money.

The conversation, instead of containing the terms of any agreement, was "all talk" and nothing more.

The plaintiff certainly did not consider he had made any binding agreement. If he did, he could not have gone into buying bonds and certificates on his own account. He would not have considered, so late as February, 1878, that he was at liberty to drop the whole scheme if Mr. Kennedy should not approve. He would not have announced, as he did in the autumn of 1878 to Mr. Kennedy, to be communicated to the others, that he did not intend to remain and manage the property after the foreclosures.

The testimony of Farley and Fisher as to what took place at the interview in question may be searched in vain for any *promise* by any of the parties to do anything except to keep plaintiff's connection with the project a secret—and that promise plaintiff says (but untruly) he violated by making a full disclosure to Mr. Kennedy.

Unless the magnitude of the suit dispenses with the elementary rule that in a suit on a contract the plaintiff must prove the contract, must show its terms with some approach to certainty, show that the parties were bound, and to what they were bound, the plaintiff has wholly failed in his case. He says over and over again in other parts of his testimony that he made a contract, but what the contract was he has not stated, any more than he stated the time of making it—which, in the latest version of his testimony, he cannot fix "within any period of six months."

II. THE CONSTRUCTION AND EFFECT OF THE AGREEMENT.

1. Even if a valid agreement was made, the plaintiff has no cause of action against the defendants.

2. If he has any cause for action, it is at law and not in equity.

And here we will consider together the propositions 2, 3, 4, and 5, above stated.

To make out any agreement at all, we must assume that in addition to the evidence actually in the case, there was enough other

evidence to prove the terms of the agreement alleged in the bill. Making this assumption, and that the agreement made embraced the terms stated in the bill, with such additions and variations as appear from plaintiff's own evidence, and the first question is as to the scope and effect of such agreement.

1. It was not one by which the parties *presently* associated themselves in any enterprise for acquiring the bonds or property. They never intended an association of *themselves alone*, or that they alone should undertake the purchase of the bonds. What they contemplated was an association *to be formed in the future*—and to be composed of themselves, Mr. Smith and Mr. Stephen.

And in the agreement certain terms and conditions were fixed for the proposed association and the enterprise to be undertaken by it, and no one of the parties agreed to enter into any such association, or to attempt to bring Messrs. Smith or Stephen into it, except on those terms and conditions. Nor did either party agree with the others that he would enter into any association with them and Messrs. Smith and Stephen for any other enterprise than that specified in the agreement.

The terms and conditions of the proposed association and enterprise were these:

1. The enterprise was to be a purchase of the bonds *for cash*, with a view to their use in the acquisition of the mortgaged property.

2. The association was to be on these terms and conditions, to be agreed to by the associates:

(*a.*) That Messrs. Smith and Stephen should furnish all funds needed for the enterprise, and, with the defendants, should principally conduct the negotiations for buying the bonds.

(*b.*) That the defendants should principally conduct the negotiations with Messrs Smith and Stephen for the formation of the association, and should afterwards act with them in negotiating the purchase of the bonds.

(*c.*) That plaintiff should furnish such facts, information and advice, and render such aid and assistance from time to time, as should be required of him.

(*d.*) That neither the plaintiff nor the defendants should be required to raise or furnish any money, or incur any pecuniary liability or risk.

That this exemption of these parties was to be one of the terms and conditions of the proposed association is evident from the sworn statement of plaintiff in his original complaint, "that neither of them should be required to raise or furnish any funds in said enterprise." (*Supra*, 22.) The plaintiff, called in rebuttal, did not dispute this term of the original agreement as before sworn to by him. And in Fisher's account of the original agreement, he says that plaintiff was to furnish no money. And in Plaintiff's story of his interview with Mr. Kittson in the spring of 1879, when he asked to have the agreement put in black and white, he says he was to do nothing toward furnishing money. And that the defendants were to be equally exempt is apparent from the reason he puts into Mr. Kittson's mouth why plaintiff's share should be less than theirs, viz.: "that they unexpectedly, at a certain time, had to raise some money," etc. If, under the agreement, it was any part of their duty to join in raising money, the fact of their having done so would be no reason for increasing their shares at the expense of plaintiff's. (Farley, 120, Q. 351; Fisher, 346-7, Q. 100.)

(1.) Such being the terms and conditions of the proposed association, it is very clear that if Messrs. Smith and Stephen could not be brought into an association *on those terms*, the agreement would be at an end. If those gentlemen would not join an association with plaintiff; or if they would not join an association in which they were to furnish all the money, and in which the plaintiff or the plaintiff and defendants were not required to furnish any, that would be an end of the agreement. And after the agreement was thus at an end, it would be of course open to defendants to form an association with Messrs. Smith and Stephen, on different terms from those provided in their agreement with plaintiff, and without violating that agreement or incurring any liability to plaintiff. This was expressly and correctly held in *Farley* v. *Kittson*, 27 Minn. 102: (Defts.' Ex. 165, p. 1579.)

And in that case, the plaintiff alleging that the defendants had violated the agreement and made an association with Messrs. Smith and Stephen on terms not authorized by it, the court held that the burden was on the plaintiff to allege and prove that the defendants could have enlisted them in an association for the enterprise *on the terms of the original agreement.*

Of course, if it was found that Smith and Stephen would not join with plaintiff and defendants on the terms proposed, there was nothing to prevent the parties from changing those terms—that is, from making a new agreement. But no one of them was bound to assent to any such change—to make any new agreement. And in this case there is neither averment nor evidence from which it can be claimed that any new agreement was made—that any change in the terms of the original agreement was assented to or even proposed.

(2.) And so if Messrs. Smith and Stephen should agree to join in the enterprise on the terms proposed, and should be unable to raise the money. In that case the enterprise would fall—would be abortive; and there would be nothing to prevent any party to the original agreement from undertaking a fresh enterprise for acquiring the bonds and property without joining the others.

All these positions are fully sustained by *Farley* v. *Kittson*, *supra*. There the plaintiff alleged substantially the same agreement relied on here, with this difference, viz., that Smith and Stephen were to be allowed but a 40 per cent. interest; and the plaintiff alleged that the defendants had formed an association with them, giving them a 60 per cent. interest. And the court *held* that plaintiff could not maintain *any* action (at law or in equity) without alleging and proving that they might have been enlisted in the enterprise for a 40 per cent. interest. That unless this were shown, the defendants might well make the agreement they did with Smith and Stephen for themselves alone and without joining plaintiff, without any violation of their agreement with him, without incurring any liability to him, and of course without entitling him to any share in the enterprise or in the profits of it.

(3.) Now in this case the plaintiff has wholly failed to show that Smith and Stephen or either of them could have been induced to

join an association of which the plaintiff was a member, or in the profits of which he was to share. And there is no presumption that either of them would have consented to become *particeps criminis* in a betrayal of private and official trusts, or to furnish money for an enterprise into which such a connection with plaintiff would introduce a serious risk.

And the plaintiff has wholly failed to prove that Messrs. Smith and Stephen could have been induced to join an association in which they were to furnish all the money, and neither the plaintiff nor the defendants should be required to furnish or raise any, or incur any pecuniary obligation or risk. And there is no presumption that they would have done so. In the association actually made, the defendants were obliged to join in all the agreements and obligations, in all the notes on which money was raised, and to pledge every available security in their possession.

And the plaintiff has wholly failed to show that if Smith and Stephen could have been enlisted in the enterprise on the terms of the agreement, they could have raised the money needed to carry it out—the money required for a cash purchase of the bonds. There is no presumption that they could have done so, and, on the contrary, it is conceded that they were not able to do so.

The plaintiff, therefore, has not shown any reason why the defendants might not make with Messrs. Smith and Stephen an association for the purchase of the bonds and property without admitting plaintiff, without thereby violating their agreement with plaintiff, or giving him any title to or interest in any of the bonds or property acquired or profits realized by the associates, or in the defendants' share of those profits, and without being liable to him in damages or otherwise.

(4.) And we need not rest here. The evidence affirmatively shows that the enterprise in which the profits, a share in which is claimed, were realized, was an enterprise undertaken after Messrs. Smith and Stephen had demonstrated their inability to raise the money for a cash purchase of the bonds, had demonstrated that the enterprise contemplated in the alleged agreement between the plaintiff and defendants was chimerical and could not be achieved.

These profits were realized by an association and in an enterprise in which the plaintiff was not a party and to which he had never agreed to become a party. By an association in which every member bound himself to the others to be "jointly and severally responsible for the payment of all moneys required to be advanced at any time in the prosecution of said enterprise, and for the full and entire performance of our agreement with said Dutch committee according to its terms and conditions; and that we will jointly and severally execute and deliver all notes, bonds, or other securities which it may be necessary to execute from time to time to procure any loans or advances required to be obtained in the prosecution and completion of said enterprise; it being understood that as between ourselves we are liable in equal shares." (Defts.' Ex. 118, p. 1269.) An association in which each member, by death, forfeited all interest in the enterprise, and the survivors were bound to take his share, and assume his liabilities, and pay his estate $75,000. (Id. 1270.) An association in which each member, the defendants as well as the Canadians, incurred obligations mounting into the millions.

And the enterprise undertaken by these associates was very different from that contemplated in the agreement between the plaintiff and the defendants. It was not merely "to acquire by purchase or contract all the bonds possible to be obtained," for the purpose of acquiring the mortgaged property. The associates also undertook and agreed to pay and did pay the Dutch committee's expenses, $280,000; to buy, and they did buy the Barnes link; to finish, and they did finish, the line to St. Vincent.

(5.) That in forming this association the defendants did not assume to act for the plaintiff, but acted for themselves alone, is clear. Messrs. Smith and Stephen never agreed with plaintiff as an associate, never heard of him as such. The division of interests, the provision in case of death, the whole scheme of the association and all the conduct of the associates, are inconsistent with plaintiff being a member of it.

And if plaintiff was not a member of it, what interest could he have in its property or its profits? We have seen that he has not proved that the association contemplated by the original agreement could be formed, and it has been proved that the enterprise con-

templated by that agreement was impracticable. But suppose the contrary to be the case. Suppose the plaintiff had shown that the defendants might have brought Messrs. Smith and Stephen into the association provided for in the agreement, and that they could have raised the money, and the enterprise of buying the bonds for cash could have been successfully prosecuted. All this would not make the plaintiff a *member* of the association to which he had not been admitted, and of course it would not give him any interest in its property or its profits.

Grant that defendants would in such case have violated the agreement. In what would the violation consist? Not in forming an association on different terms or for a different purpose from that contemplated—and if the violation did consist in this, how could the agreement, or the breach of it, operate to make plaintiff a member of an association formed in violation of the agreement? The breach would consist simply in not doing what they had agreed to do. It would consist in *not* forming an association, with plaintiff as a member, on the terms of the original agreement.

The case is precisely similar to an executory contract between A and B to form a partnership at a future day. The day comes and B refuses. A has his action for damages, for the breach is complete. Does it affect the case at all that B, before or after the day set, has formed a partnership with C for the same business? Or does A become entitled to any part of the profits of *that* firm, or of B's share of them? Or are the legal relations of A and B growing out of their contract and its breach in any way affected by the formation of the firm of B and C?

In the case supposed and in this case the only right of the injured party would be a right to damages, and his remedy would be at law, and would be adequate and complete.

Nor would it alter the case were it shown (as it is not) that the defendants falsely represented to the plaintiff that in making the new association they had acted for him, and in his name had effected an association between him and themselves and Messrs. Smith and Stephen, and if it were also shown that the defendants by these means obtained from him "facts, information and advice indispensable to the success of the enterprise." This false repre-

sentation of the facts would not alter them—would not make him an associate, nor entitle him, as an associate, to an interest in the enterprise. Doubtless, he would be entitled to recover the reasonable value of his advice and services in an action at law, and this would be his adequate and sufficient remedy.*

But it may be claimed that by the terms of the original agreement the association for the enterprise was to include only the defendants and the Canadians. That plaintiff was not to be an associate with Messrs. Smith and Stephen, not interested in the bonds or property purchased, or in any undivided profits of the syndicate, but merely in the shares of the defendants.

In this case, of course, the plaintiff would be an entire stranger to Messrs. Smith and Stephen and to the Manitoba Co., and his bill against that company must be dismissed. 2 Lindley Partnership, (5th Ed.) 460-1, 493.

But neither the bill nor the evidence will bear this construction. The plaintiff was to be one of the purchasers of the bonds—one of the purchasers of the railroads, (Bill, par. I, p. 4,) and just as Messrs. Smith and "Stevens" were to have certain interests in "the enterprise," so the remaining interest "belonged to your orator and the said Kittson and Hill in equal proportions." (Bill, par. II; pp. 5, 6.) The plaintiff's relation to the enterprise was to be the same in nature and extent as that of Mr. Kittson and of Mr. Hill. He was to be interested—to be an associate—in "the enterprise," and not merely interested as a subpartner or subassociate in the share of profits realized by Messrs. Kittson and Hill, with no interest in the bonds, or the property purchased, or in the "enterprise" itself.

And plaintiff's and Fisher's testimony as to the conversation in which the agreement was made will be searched in vain for anything to indicate that plaintiff was to stand on any different footing from defendants—was to be a subpartner under them, and not, like them, an associate of Messrs. Smith and Stephen.

And the bill says (par. I, p. 4,) that plaintiff was to occupy the same position as defendants as "purchasers of said lines of railroad," etc., and also (par. IX, p. 11,) that the defendants never

* As to the foregoing positions see Disbell v. Fox, 114 U.S. 202, 257-8.

denied or questioned plaintiff's right "to an equal share and interest *in said enterprise*," etc.

It is true the plaintiff's interest was to be concealed from the world at large, but he was to be not the less a partner or associate with the other four because a dormant or secret partner.

But even if the court should hold that plaintiff's agreement was not for an interest in the enterprise but merely in defendants' shares of the profits, the plaintiff is in no better case. He would be entitled only to a part of defendants' share of the profits of the enterprise contemplated by that agreement, conducted by an association formed in accordance with the terms and conditions of that agreement. And neither the association nor the enterprise was such as the agreement contemplated.

In any view of the case, therefore, and even if the agreement in question was made and was valid, the plaintiff has no cause of action—certainly none of equitable cognizance.

If it be said that the objection of a remedy at law comes too late after answer and proofs, the answer is that this objection goes not to the case made by the bill, but to that made by the evidence, and could not be made till the evidence was in.

III. THE LEGALITY OF THE AGREEMENT.

And here two principal questions are presented:

1. Was the agreement on which the suit is founded, a lawful and valid contract, or was it illegal and utterly void?

2. If the agreement was, in its inception, illegal and utterly void, and a mere nullity, can the plaintiff maintain this bill, based on the agreement, for an accounting and division of the profits resulting from the performance of such illegal and void agreement?

On these questions the circuit court has already spoken in this cause in language not to be mistaken. Judges Treat and Nelson, on both questions, in their decision on the plea, 14 Fed. Rep. 114; and Mr. Justice Brewer, on the first question, in the decision here in question. (1776-7.)

But the case is of first impression, the first instance where a rail-

way receiver has asked the court that appointed him to divide among himself and his alleged confederates the profits of an alleged conspiracy to wreck the railway in his charge. And the first of these questions has not been decided in this court. When the amended bill was filed, (after a plea interposed to the original bill,) it was considered by defendants' counsel that while the amended bill (Par. III, p. 7,) alleges that plaintiff "was appointed receiver and made general manager," it does not state *when* he was so appointed, or that he was such receiver or manager *at the time of the making of the alleged agreement.* It therefore seemed to them that the bill did not on its face show that such agreement was illegal *in the making*, and so was not open to demurrer on that ground. They therefore interposed a plea, showing, among other things, when plaintiff was appointed receiver and when general manager, how long he held those offices, and that he held both of them at the time when the bill states the agreement was made. From a decree dismissing the bill the plaintiff appealed, and both the foregoing questions were argued in March, 1876. No decision was made, but the court ordered a reargument *of the whole case*—that is, of both questions. At the ensuing term, in December, 1876, both questions were elaborately argued orally and in printed arguments. Again, no decision of either of these questions was made. The court considered that defendants' counsel had erred in their construction of the bill, and *held* that *if* the fact of plaintiff being receiver and general manager at the date of the agreement would make it illegal, and so preclude this suit to enforce it, still that fact sufficiently appeared on the face of the bill; and therefore the defendants, seeking to defend on the ground of illegality, should have made that defence by demurrer, and could not be permitted, at the hearing on the plea, to assail the bill for want of equity, by reason of such fact so appearing on its face. *Farley* v. *Kittson*, 120 U. S. 303, where the averment in the bill as to plaintiff's receivership is quoted on page 306.

These reasons seem to justify—indeed to require—a fuller argument of the two questions that have been stated than would otherwise be necessary or proper.

And at the outset it may be as well to say that the contract, and the only contract here involved, is that claimed to have been made between these parties, and not the contracts whereby the committee's bondholders sold their bonds, nor the decretal sales and conveyances of the mortgaged property. We say this because in every one of the numerous arguments already had in this case, the plaintiff's counsel have confused the question whether the plaintiff's alleged agreement with defendants Kittson and Hill was illegal, and hence void, with the question whether the purchases of the bonds and of the mortgaged property were absolutely void or merely voidable by the bondholders. And they have marshaled a great array of authorities to defend the position (which we have never assailed or thought of assailing) that such purchases were merely voidable. And from this they argue that *therefore* the agreement here in question is merely voidable, and, if merely voidable, cannot be illegal, since what is illegal is void. And they seem to claim that *this agreement*, (and not merely the purchases of the bonds and property,) being as they say voidable, is voidable by the bondholders only, and, as the bondholders have not sought to avoid it, it remains valid.

That the bondholders, whatever their right to avoid the purchases of bonds and property, could not avoid *this* agreement between *these* parties, is too plain for argument.

And the argument drawn from the voidable character of the purchases of the bonds and property needs little more than a statement of it to be refuted. A mere purchase of bonds or of mortgaged property is in itself an entirely lawful contract, both in its consideration and its purpose, as much so as the sale of a horse. The sale in either case may be avoided for fraud practised by one party on the other; but the fraud is not inherent in the contract of purchase and sale, is not a term of it, is not a part of it, does not enter into its consideration or its purpose, but is wholly collateral to it. And it makes no difference in the voidability of the contract whether a single person—buyer or seller—is alone concerned in perpetrating the fraud, or whether, in so doing, he is carrying out a conspiracy to defraud, previously concerted between himself and

others. In any of these cases the defrauded buyer or seller has a right to adhere to or to avoid the contract as he may elect, and according to his own views of his own interests. Notwithstanding the fraud it may be to his interest to maintain the contract, which he could not do if it were absolutely void. And he has this right of avoidance not for any infirmity in the contract itself, but because of matter collateral to and *dehors* the contract, viz., the fraud practised on him. The fraud practised is unlawful, but not so the contract, of which the fraud is no part. And it makes no difference whether the fraud was actual and "positive" or merely constructive. In either case the contract is lawful and is not void, but is voidable for the collateral matter—the fraud.

But as between the parties to such conspiracy to defraud a third person, the case is far different. Their agreement is not like the sale of bonds or of a horse, entirely lawful in itself, in its consideration and its purpose, but made voidable by fraud practised by one party on the other, or other extraneous collateral matter. The infirmity of the agreement between the conspirators to defraud is inherent in the agreement itself. That agreement is void because it is an agreement to do an unlawful act—to practise a fraud on a third person. This purpose is not something collateral to the agreement but is part of it. And the agreement is void in the making, and is equally void whether the fraud contemplated by it is or is not practised.

The class of cases cited by plaintiff make this entirely plain. Fraud is practised at an execution sale or at the letting of a prison-labor or like contract. The judgment debtor in the one case, or the state or county as the case may be, in the other, may avoid the sale or contract on that ground, or may affirm it. He has his election. The sale or contract is voidable only, and it may be for his interest to stand by it notwithstanding the fraud. But if the fraud was practised in pursuance of an agreement between intending bidders or others, and one of them sues the other on that agreement, the question *between them* is on their own agreement, and not on the voidability of the execution sale or the labor contract. And *their* agreement is either valid or void, according as

its purpose or tendency were innocent or fraudulent towards third persons, and entirely irrespective of whether fraud was or was not practised at the letting or the sale. *Gibbs* v. *Smith*, 115 Mass. 592, 593-4.

Having thus cleared the ground, we proceed to discuss the two questions that have been stated.

FIRST.

Was the agreement on which the plaintiff founds his suit, a lawful and valid contract, or was it illegal and utterly void?

And we say that it was illegal and utterly void, because made upon an illegal consideration and for an unlawful purpose.

THE MAKING OF THE ALLEGED AGREEMENT CREATED A DIRECT CONFLICT BETWEEN PLAINTIFF'S OBLIGATIONS AND INTERESTS THEREUNDER AND THE FIDUCIARY DUTIES HE OWED TO THE COURT WHOSE RECEIVER HE WAS, TO THE DUTCH COMMITTEE AND THE BONDHOLDERS THEY REPRESENTED, WHOSE SPECIAL AGENT HE WAS, AND TO THE BONDHOLDERS AND STOCKHOLDERS INTERESTED IN THE PROPERTY IN HIS CHARGE AS RECEIVER AND GENERAL MANAGER. THE AGREEMENT WAS IN ITSELF A BREACH OF TRUST. IT CONTEMPLATED AND PROVIDED FOR THE CONCEALMENT FROM THE COURT OF PLAINTIFF'S INTEREST IN THE SCHEME TO BUY THE BONDS AND THE MORTGAGED PROPERTY, AND NECESSARILY TENDED TO THE COMMISSION OF OTHER FRAUDS AND BREACHES OF TRUST.

SUCH AN AGREEMENT IS AGAINST PUBLIC POLICY AND UTTERLY VOID, AND CAN GIVE RISE TO NO RIGHTS WHATEVER.

I.

The obligations and interests of the plaintiff under the agreement are clearly defined. As agent for the Dutch committee, and as receiver and general manager, he was possessed of peculiar knowledge of the "whereabouts and situation of the mortgage bonds, the rated value thereof by the holders, the mode thereby and the channel through which the same could be reached and procured," and also of "the situation, amount, character and value of the lines of railroad" and other mortgaged property, and of "the pending suits for the foreclosure of said mortgages." He was able to give to the other parties "facts, information and advice," and to render "ser-

vices in respect to all of said matters," in carrying out the scheme, which, as he says, "were indispensable to the success of said enterprise." By the terms of the agreement plaintiff was to furnish no money, but was to "furnish such facts, information and advice and render such aid and assistance," *not* as he in his fiduciary position might lawfully render, but "as should be required of him" by the other parties. This was to be the capital on which he traded, and was to be his sole contribution to the "enterprise." In return for this investment of his knowledge, his advice and his services, plaintiff was to have an equal share with the other parties to the agreement in the enterprise and in the profits—profits which he alleges amounted to upwards of $15,000,000.

And the plaintiff's connection with the "enterprise" of buying first the bonds, for whose holders he was agent, and secondly, and by means of the bonds, the mortgaged property in his charge as receiver and general manager, was to be and was kept secret from the court, from the bondholders, and from the stockholders.

II.

Such being the things which plaintiff was to do and to receive under the agreement, what were his duties to the court, to the Dutch committee and the bondholders they represented, to the other bondholders and to the stockholders? Wherein did his obligations and interests uuder the agreement conflict with those duties? What opportunity did his position as agent for the committee, and as receiver and general manager, furnish for the commission of frauds upon the court and the stockholders and bondholders? And what temptation did his obligations and interests under the agreement hold out to him to deceive and defraud the court and the bondholders and stockholders?

These are material questions, for agreements are held void as against public policy which *tend* to the commission of breaches of trust and frauds, BY FURNISHING A TEMPTATION to commit them, as well as agreements which expressly provide for and are followed by acts of fraud.

As to plaintiff's duty to the court—

1. He owed the court *fidelity*. The court had undertaken the

delicate and responsible duty of operating a line of railway until it should be sold under decree of foreclosure. It was the duty of the court to manage this property, not in the interest of any one bondholder, or any set of bondholders, nor, indeed, in the interest of all the bondholders, if those interests conflicted with the legitimate rights of stockholders or others,—but in the interest of all concerned in the property.

And the court had a right to require that the receiver through whom it was managing the property should manage it in the interest of all, and not in the interest of himself and associates; and more than this, the court had a right to require,—it was the court's duty to require,—that its receiver should keep himself aloof from any temptation to sacrifice the interests entrusted to his charge to his own personal interests. The court had the right to require, and the plaintiff owed it to the court, that he should make no agreement by which he should expose himself to any such temptation.

He owed it to the court that he should do nothing to the discredit of the court—nothing that would bring the court or its administration of the trust, or the administration of similar trusts by the same or other courts, into suspicion or contempt.

2. He owed it to the court and to the parties that he should be *entirely disinterested*. It is part of the definition of a receiver that he is an "indifferent person." *Booth* v. *Clark*, 17 How. 322, 331. "The receiver is the officer and the representative of the court, having in his character of receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties." *Beverley* v. *Brooke*, 4 Grat. 187, 208. It was his absolute duty to refrain from making any agreement, open or secret, which should make him other than disinterested. Any such agreement would be, in the very making of it, a violation of this duty.

3. He owed to the court *entire candor*.

The receiver is not merely the arm to execute the orders of the court. The judges, while they assume the charge and operation of railways, are not experts in railway management, nor can they possess the intimate acquaintance with the property or its earning capacity which would enable them to know its value, or even to

know if it was operated faithfully or to the best advantage. In all these matters the court must depend on the receiver. And when the final decree is entered, and a sale is to be made and confirmed, the court has the right to look to its receiver for information that will enable it to determine in what manner or in what parcels the sale had best be made, and whether the price realized be such that the sale should be confirmed. It has a right to require of the receiver that he shall furnish to the master making the sale truthful particulars for his advertisement of it, and to intending bidders truthful information on which they may act in bidding on the property, and that he shall have no interest and be under no temptation to conceal or pervert the truth.

And the court has the right to require, not only that the information and advice it may receive or seek from the receiver shall be truthful and disinterested, but that the receiver shall be under no temptation to make it otherwise. And it has the right to know whether it is receiving such advice and information from a receiver whose only motive and whose only interest are identical with its own—that is, to administer the property with a single eye to the benefit of the *cestuis que trustent*—or whether the receiver is interested in the purchase of the bonds or of the mortgaged property, and so possessed of interests antagonistic to those of the court and the *cestuis que trustent*, and hence incapable of disinterested action.

Hence it was the absolute duty of the plaintiff to refrain from taking the first step toward making such an agreement without first informing the court—a course which would at once compel an abandonment of his project or of his office.

As to the plaintiff's duty to the bondholders and the stockholders—

For the bondholders represented by the Dutch committee, and for any other bondholders that J. S. Kennedy & Co. represented, the plaintiff was a special agent, in addition to his relations to them as receiver and general manager.

Upon the question of the sale of the committee's holding, the committee, in advising their constituents, must largely rely upon the information and advice received from plaintiff and from J. S.

Kennedy & Co., their American representatives, who in their turn must depend to a great extent on the plaintiff. And if, as is claimed here, even Messrs. Hill and Kittson, with their long residence in Minnesota, their familiarity with the country on which the lines depended for present and prospective business, the traffic connections of their own steamboat company with the two railroad companies, and Mr. Hill's close relations with the management of the First Div. Co.—if they were obliged to be told by plaintiff what the bonds were intrinsically worth and what they could afford to pay for them, how much more would J. S. Kennedy & Co. and the committe have to depend on the knowledge and advice received from plaintiff in making up their judgment as to the intrinsic value of the bonds, and what price the committee's constituents ought to ask and receive on any sale of their holdings.

And the plaintiff must have been aware that in any negotiations for the purchase of the committee's holding he would be, as he was, treated by the committee and J. S. Kennedy & Co. as one of their own party, acting on their behalf, and be confidentially entrusted with a knowledge of their views, and of embarrassments in their situation, which could not, without prejudice to the bondholders' interests, be divulged to the intending buyers.

And that plaintiff was thus treated, and was informed of the secrets of his principals, sometimes with express directions to keep them secret, is manifest in every stage of the negotiations. See the following letters of Barnes to Farley:

June 9, 1876, Plff's Ex. 87, p. 252.
" 19, " " " 89, p. 253.
Feb. 6, 1877, " " 116, p. 277.
June 27, " " " 132, p. 289.
Sep. 24, " " " 149, p. 304.
" 29, " " " 153, p. 309.
Oct. 2, " " " 154, p. 310.
" 10, " " " 155, p. 469.

And the following letters of Farley to J. S. Kennedy & Co.:

June 30, 1877, Defts.' Ex. 84, p. 1015.
Sep. 26, " " " 90, p. 1017.
" 27, " " " 91, p. 1018.
Feb. 15, 1878, " 71, p. 1008.

Also—

Barnes to Farley, Feb. 19, 1878, Defts.' Ex. 46, p. 993.
Farley to J. S. K & Co., Feb. 22, 1878, Defts.' Ex. 72, p. 1009.

And see Table I., prefixed to this Argument.

And that J. S. Kennedy & Co., in their views of the property, and consequently of the prices the committees' constituents should get for their bonds, relied on "facts, information, and advice" furnished by the plaintiff, is a necessary consequence of their respective positions. And see Mr. Kennedy's deposition in the *Sahlgard Case*, put in evidence by plaintiff. (Plff.'s Ex. 245, pp. 1762-4, C. Q. 52-54; And see Carp, 462, Q. 14.)

The plaintiff owed it to these bondholders, whose agent he was, to whose counsels he was admitted throughout the negotiations, that he should have no interest adverse to theirs; that he should not be a spy in their camp. And they had the right to require of him, and he owed it to them, that his advice should be absolutely disinterested, and that the information or opinions given by him should not be those of the buyer advising the seller.

As to the plaintiff's duty to all the bondholders and to the stockholders.

This of course was to manage the property to the best advantage —so as to keep it in good condition and make it productive. Faithful management would tend to enhance its value and the *intrinsic* value of the bonds, at least, if not of the stock. And truthful reports of the results of such management would tend to enhance the *market* value of the bonds.

And upon those reports—upon information derived from the receiver, in case of one line, and from the general manager, (either directly or through the medium of the trustees,) in case of the other line, the bondholders must necessarily rely for information on

which to estimate the value of their bonds. And they had a right to require, and the receiver and general manager owed it to them, that the management of the roads should be faithful and disinterested, and that reports of their earnings, expenses, condition and prospects should be furnished, and should be truthful and disinterested, and that the receiver and general manager, in his management, and in the reports and information furnished by him, should be under no temptation to make them other than disinterested and truthful. And when some of them were negotiating a sale of their bonds, they had a right to know whether one of the buyers was the receiver and general manager.

And when a decree for sale should be entered, the bondholders and stockholders and intending bidders had a right to require that the receiver and general manager, having, as he says, more intimate and exact knowledge than any other man, of "the situation, amount, character and value of the lines of railroad and property mortgaged," should furnish to the officer making the sale, and to the intending bidders, full, truthful and accurate information on all matters connected with the property which might affect its selling value. And they had a right to require, and he owed it to them, that he should not, by reason of his being, openly or secretly, engaged in a scheme to buy at the sale, or for any other reason, be under any temptation to withhold or falsify information so as to deter bidders, or check competition, or prevent the full value of the property from being realized at the sale.

III.

Wherein did the plaintiff's obligations and interests under his alleged agreement conflict with his duties to the court, to the Dutch committee, and to all persons interested in the property in his charge as receiver and general manager?

What opportunity did plaintiff's official position furnish for the commission of frauds upon the court and upon his *cestuis que trustent*, whether bondholders, stockholders or others?

What temptation did plaintiff's interests under his alleged agreement hold out to him to be unfaithful to his duties to the court and to his *cestuis que trustent?*

These questions will be considered together.

1. His duty to the court, to the bondholders and to the stockholders required him to abstain altogether from making any such agreement as that which he alleges. And if, tempted by his cupidity, he had made it, then, his duty to the court was to inform it at once and fully of the agreement he had assumed to make, and of the interests and obligations which he thereby assumed to acquire and undertake. It was his manifest interest under the agreement to conceal it. There can be no question but that a disclosure or discovery would have been followed by the consequence he says he feared—his own immediate removal from office. No court that had assumed and was discharging the duty of operating a railway by its receiver would, after such a disclosure, retain in office a receiver confessedly unfitted for his trust.

His removal from office, besides involving the loss of his lawful emoluments, would in effect have defeated the entire "enterprise"—if the statements in the bill are to be credited. And even if the others had been able and willing to carry out the enterprise without his secret aid as receiver,—after the withdrawal of his capital from the joint stock,—still the plaintiff, having drawn out his capital, could not expect to share in the profit of an enterprise to which he had no longer anything of value to contribute.

His duty to all the bondholders and to the stockholders also was to disclose the alleged agreement, while his interest was to conceal it. His position of general manager with its legitimate profits would, as he says he feared it would, be lost to him, and a receiver of the First Division lines would be appointed.

His duty to the court and the bondholders was to manage the property with such fidelity, and render such truthful reports and information of its earnings and condition, that the market value of the bonds, and "the rated value thereof by the holders," would be enhanced beyond any valuation based on faithless management, or untrue reports of the results of honest management. And in like manner faithful management and honest reports would enhance the selling value of the mortgaged property, and tend to produce higher bids for it when offered for sale under the decree.

His duty to the Dutch committee and their constituent bondhold-

ers whom he especially represented required that in the negotiations for the purchase of their holding of bonds, he should aim to secure for them the highest possible price, and certainly should do nothing to prevent their realizing such price.

But his interest as buyer of the bonds and of the property was to depreciate the selling value of both, and hence it was his interest to reduce its earnings by mismanagement, or to give false information and reports, concealing or disparaging any profitable results, whether such profits followed upon faithful or faithless management. And it was his interest to give to the Dutch committee such views of the value of the property as were given (and he says with his concurrence) in the defendants' letter to Carp of Jan. 29, 1877; views directly in conflict with what he swears were then his own real opinions as to the real value of the property, and especially of the extension lines. *Emptor emit quam minimi potest.*

As to this letter and what plaintiff says were his real opinions, see:

Letter, pp. 530-2; Farley, 154, C. Q. 186j; 1431, C. Q. 9. And compare 1430, C. Q. 8, and 1441-1455, R Q. 1-59.

And so when, as he says, Mr. Hill proposed to send a man to Amsterdam to buy bonds and committee's certificates in open market, it was plaintiff's duty to encourage, certainly not to dissuade him, for such action would have raised the prices of all bonds, including the committee's holding. His interest was to prevent such action, in order to keep down prices. And he counts it as one of his chief services to the enterprise that he stopped what would, as he says, have raised prices 100 per cent. —but would still have left a handsome profit to the purchasers.

In short, his duty required fidelity and honesty. His interest would be served by faithlessness and deceit.

2. The plaintiff was in a position enabling him, if he so desired, to deceive alike the court, the committee, the bondholders and stockholders, and bidders at the decretal sale, not merely as to his interest in the enterprise he had undertaken, but also as to the condition, earnings, business, and prospects of the railroads, and as to the value of the property and of the mortgage bonds.

3. And he was under a temptation such as few men have been

tried by, to sacrifice to his personal interests the duties he owed alike to the court and his *cestuis que trustent*. On the one hand were honor, duty, and the liberal salary of a receiver and manager; on the other, "the possibility of wealth beyond the dreams of avarice." He says it was expected that his two associates would be required to give a 40 per cent. interest in the enterprise to the persons whom *they* procured to join in it and to furnish the needed money, and that one-third the residue—one-fifth the entire profits—was to be his share. He says in his bill that those profits exceeded $15,000,000, his share being at least $3,000,000. What wonder that so dazzling a temptation should blind him to considerations of honor and duty. And if plaintiff's statement is to be believed, if he really made the agreement sued on, and if in his after conduct he was guilty of no fraud, no breach of trust, other than in concealing the agreement, he may well stand astonished at his own moderation.

But it was just because the temptation was so overwhelming, the profits to accrue from yielding to it so enormous, that the law forbade him to face it, commanded him to put it behind him, to flee from it. It will be seen in cases to be cited that a contract by which a man places himself where his interest tempts him to a breach of good faith, is utterly void, though the temptation is measured by the inconsiderable sum of $10,000, or the paltry one of $20. How much greater the need that the "sting of disability" should be put into the temptation when it is such as the sternest virtue can hardly be expected to withstand.

4. In regard to the duties of one in plaintiff's position, his opportunities and temptations, and the disabilities which the law imposes as a protection against those temptations, valuable observations will be found in two cases in the Irish chancery: *Eyre* v. *McDonnell*, 15 Ir. Ch., 534, 548, 551; *Alven* v. *Bond*, Flan. & Kelly, 196,213. And on the same subject the views expressed by the Supreme Court of New Hampshire in *Ashuelot R. Co.* v. *Elliot*, 57 N. H. 397, 431-7, 440-1, are profitable reading.

IV.

Clearly, then, by entering into any agreement—*open* or *secret*—for the purchase of the mortgage bonds or the mortgaged property, or both, a railway receiver or general manager for mortgage trustees in possession places himself at once in a position where his personal interests are antagonistic to those of his *cestuis que trustent* and to the duties he owes to them and to the court; where he has the opportunity, afforded by his office, to sacrifice, to a greater or less extent, those interests to his own; and where he at once becomes subject to a temptation to make that sacrifice—a temptation greater or less, according to the amount of his interest and of his expectation of gain under the agreement.

V.

In the very leading case of *Fuller* v. *Dame*, 18 Pick. 472, (a case everywhere cited with approval,) the facts were these:

The Boston & Worcester R. Co. was about to be constructed into the city of Boston—its easterly terminus. Dame was the owner of a large tract of land upon or near a part of which, to enhance its value, he desired the company to fix its terminal freight-stations, etc. In order to accomplish this, it was believed to be necessary to form a company which should purchase a large tract of land, and make to the railroad company large donations of money and land to secure the desired location. The plaintiff, Fuller, was a stockholder in the railroad company.

On October 1, 1832, Fuller and Dame made an agreement, reciting Fuller's belief that the public good and the good of its stockholders required that the railroad company should fix its terminus in the locality desired by Dame, and by which Fuller agreed that he would aid Dame in forming his proposed company, and in causing the railroad company to fix its terminal buildings and grounds in the locality desired. And Dame agreed that a note for $9,600, then made by him and payable three years thereafter to Fuller's order, and lodged with C. & M., should be delivered to Fuller when the railroad company should have fixed its freight-house in the desired locality, and that such note, being so delivered, should be

paid to Fuller according to its tenor. At the same time Dame paid Fuller $400 in cash on the same account.

A company was formed known as the South Cove Corporation, of which Fuller became a member. The project was carried out, to the very great profit of Dame in the enhanced value of his lands.

Fuller having received and sued on the note, evidence *pro* and *con* was offered as to the extent and value of his services, but was excluded as immaterial and irrelevant.

In delivering the judgment of the court in favor of the defendant, Chief Justice Shaw said, (p. 479:)

"The court are of opinion that this contract was obviously contrary to public policy, to open, upright and fair dealing, and cannot therefore in point of law be supported."

(P. 481.) "The court are of opinion that this does not stand upon the ground that the promise is void because it was given to induce the person to whom it was made to do an unlawful act. *It is an undoubted principle of law that where a promise is made to one in consideration of doing an unlawful act, as to commit an assault* or *practise a fraud on a third person, the promise is void in law.* * * * *The law goes further than merely to annul contracts where the obvious and avowed purpose is to do or cause the doing of unlawful acts. It avoids contracts and promises made with a view to place one under wrong influences—those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons.*"

(P. 482:) "The case in question is, we think, clearly within the operation of this salutary principle. Without considering other aspects of the contract, we are of opinion that it was contrary to public policy and to upright and fair dealing, (1) as it tended injuriously to affect the public interests in establishing the fittest and most suitable location for termination of the Worcester railroad for the accommodation of the public travel; (2) As it affected the interests of the proprietors of the Worcester railroad; (3) As it affected the interests of the joint-stock company incorporated under the name of the South Cove Corporation."

After speaking of the public character of the railroad and the public interests involved in the location of its terminus, and adverting to the fact that, though not one of the directors with whom it lay to fix the terminus, Fuller was a stockholder and hence an

elector of directors, and that "the election might depend on the known views of candidates on this very question of location," and after saying "they had a right to his disinterested judgment and advice upon the question of location, and this could not be exercised whilst he held and relied on a promise for a large sum of money, the payment of which depended on the decision of this question by the directors"—the judge proceeds, (p. 484:)

"2. It was contrary to public policy and the principles of fair dealing as it affected the private interests of the two companies. Mr. Fuller was one of the original proprietors of the Worcester railroad. His associates had a right to believe that in all his acts as such stockholder, in choosing directors, in framing by-laws, and doing other acts pursuant to the powers of the corporation, he had a common, and, in proportion to his shares, an equal interest, and they had a right to rely on his judgment, his recommendations of directors, and other acts, with all the confidence inspired by such a belief. *A contract assuring him separate and distinct advantages operated to mislead and deceive them, and thus had a tendency to operate as a fraud upon them.*

"3. The same considerations apply to the case of Mr. Fuller as a member and stockholder in the South Cove Corporation. * * The members of this company had a right to have the question whether they should contract with the Worcester Railway Corporation, and the terms on which they should so contract, settled and decided by a sole regard to the interests of that corporation as a company of owners, purchasers and adventurers. *Any influence from any quarter, created by the promise of a sum of money, to induce them to so contract, and to yield to particular terms, with a view to separate and extraneous interests, operated as a fraud upon them and rendered such promise void.*"

And the judge further says, (p. 485:)

"*We are aware that there is no stipulation in this contract that it should be kept secret. There is certainly no intimation that it should be disclosed to either of these companies, or otherwise made public. The contract was of such a nature that it would be likely to defeat its purpose to make it public. It is therefore reasonable to presume that it was not intended to be made public.* In point of fact it does not appear that it was known to any one but the parties interested and the depositaries of the note and agreement until after the object was accomplished. *But it is enough for the purpose of the present argument, which goes to establish a general rule, that such agreement might be kept*

secret from all those on whom the influence was intended to be exerted, and that in general it would be for the interest of the parties to keep it secret, and thus that it would be productive of all the injurious consequences alluded to."

VI.

This case of *Fuller* v. *Dame* is direct authority for these propositions.

1. *A promise or contract the making of which places one in a position of temptation to deal unfairly with other persons, is against public policy and is a void and illegal promise.*

2. *Such promise, being void and illegal, is not sufficient consideration to sustain a contract, and a promise or contract upon such a consideration is itself void, and illegal also.*

Lest it should be urged that the morality of *Fuller* v. *Dame*, (and hence the law based upon it,) is a survival of strait-laced Puritanism, belongs to a narrow section and a past generation, and is unsuited to the expanded trade, the liberal culture and the broader life of the country at large in these latter days, we subjoin some typical instances, selected from a great mass of cases exhibiting the frailty of humanity in situations of temptation, which at once vindicate the need and the wisdom of the doctrine and the rigor with which it has been enforced in England, in the States of the Union from New England to California, and in this court.

Having stated these cases, we propose to show from them not merely that the agreement alleged by plaintiff was illegal and utterly void in its inception and in the making of it, but also that the second principal question in this branch of the case must be answered in the negative—that is, if the agreement alleged by plaintiff was illegal in its inception, this suit cannot be maintained.

In *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. Div. 549, the case was this: Defendant, having made tender for repair of ships of the Great Eastern Ry. Co., contracted to pay plaintiff a commission for superintending such repairs. Plaintiff was the Great Eastern Co.'s advisory engineer as to the repairs, and part of

the consideration of defendant's promise was plaintiff's promise to use his influence with his company to get defendant's tender accepted. The action was for a balance of commissions for superintending the repairs, which had been completed by defendant. The jury found that the contract, though calculated to bias plaintiff's mind, had not in fact done so, and that he had not given less beneficial advice to his company than he would otherwise have done. *Held*, that the contract was void because of its corrupt consideration.

"*Cockburn*, C. J. Our judgment must, in my opinion, be for the defendants. I will assume, for the purposes of argument, that the agreement did not influence the mind of the plaintiff so as to induce him to do anything dishonest towards his employers, the Great Eastern Railway Company. I entertain no doubt, however, that when a bribe is given, or a promise of a bribe is made, to a person in the employ of another, by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforcible at law, whatever the actual effect produced on the mind of the person bribed may be. *The tendency of such an agreement as this must be to bias the mind of the agent or other person employed and to lead him to act disloyally to his principal.* It is intended by the party who promises the bribe to have that effect, and the other party knows such is his intention. Such a bargain is obviously corrupt. *It would plainly be in contravention of the maxim, ex turpi causa non oritur actio, and most mischievous, to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not in fact damaged. It is sufficient that the consideration upon which the promise was made was intended to be a corrupt one.*

"*Mellor*, J. I am of the same opinion. It is not because the agreement failed to have the same effect which it was intended to have in corrupting the plaintiff's mind that therefore it can afford the basis of a good cause of action. *It would be most fatal if it were open to a person who had entered into an agreement that he knew was designed to induce him to act unfaithfully to his employer, to allege that it had not in fact had that effect, and to recover upon it on the ground that the employer had not been damaged.*

"*Field*, J. I am of the same opinion. I am very glad that we have an opportunity of distinctly declaring the law upon this point, which was left undecided in the case of *Smith* v. *Sorby*. The present case affords an instance how sadly loose commercial practice has become in respect to transactions of this nature. If the point we are now deciding has never been exactly decided before, it is most clearly within the principles laid down by the authorities on the subject. It really needs no authority to show that, even although the employers are not actually injured, and the bribe fails to have the intended effect, a contract such as this is a corrupt one, and cannot be enforced."

In *Bollman* v. *Loomis*, 41 Conn. 581, the defendant, a piano-dealer, hired plaintiff to induce R., who relied on plaintiff's judgment, to buy of defendant a piano which both R. and plaintiff had already examined, and which plaintiff, an expert, had pronounced a good one. Plaintiff advised the purchase, and after it was made claimed his reward. Defendant at first denied any employment, but the parties finally agreed on $20 as the sum to be paid. For this sum plaintiff brought suit. The court held the transaction void because "*inconsistent with fair and honorable dealings, contrary to sound policy, and offensive to good morals*," and says:

"The plaintiff may have said nothing as to this piano which he did not believe to be true, and the defendant may have obtained for it no more than it was worth. But the means resorted to to effect the sale deceived and misled the purchaser and was in violation of private confidence. Such contracts and acts are deemed equally reprehensible with positive fraud. *They are within the same reason and mischief as contracts made and done with an evil intent, and are therefore prohibited by law.*"

And the court quotes from *Fuller* v. *Dame*, as to the unlawfulness of contracts which place one in a position of temptation, and *tend* to the commission of frauds.

In *Byrd* v. *Hughes*, 84 Ill. 174, it was agreed by defendant, in consideration that plaintiff, the agent of T. and W., should induce them to discharge their attorney and appoint defendant in his place, defendant would divide with plaintiff the profits of the employment. Plaintiff's bill was for an accounting and division of the realized profits, alleged to amount to $300,000. A demurrer to the bill was sustained. The court say:

"*The complainant, whose duty it was* to guard and protect the interests of Turner at Washington, whose agent he was, and to give them honest advice, and *not to place himself in a position where there would be a conflict between duty on the one hand and self-interest on the other, in utter disregard of these well-known and wholesome principles, entered upon the task to induce his principals to discharge their attorney and employ, in his stead, the defendant.* What was the object? Surely not to enhance the interests of his principals, because he concedes they had in their service an attorney of skill and learning. But the sole object was that he might obtain one-half of all fees the attorney might earn in the transaction of his principal's busines. * * *

"*We are aware of no principle of equity jurisprudence which would allow a court of equity to lend its aid to assist the complainant in the collection of fees earned under a contract based,* as this one is, *upon a consideration immoral and illegal.* A contract based on an illegal consideration could not be enforced in a court of law; much less will a court of equity, where a complainant is required to come into court with clean hands, enforce the performance of a contract founded upon an illegal consideration."

In *Swan* v. *Chorpenning*, 20 Cal. 182, plaintiff having put in a bid for carrying the mail, it was agreed between the parties that in consideration that plaintiff should withdraw his bid, and use his influence to get a contract for defendant over a longer route including that bid upon by plaintiff, the plaintiff should have an interest in such contract or an equivalent pecuniary compensation. Plaintiff had a verdict of $30,000, from which the defendant appealed. After holding that "any agreement tending to deprive the government of the advantage of competition in the bidding is unlawful and void," quoting from *Gulick* v. *Ward*, 10 N. J. Law, 87, the court say, (p. 185:)

"It is contended that the particular circumstances of this case relieve the transaction of its illegal character; but we take a different view of those circumstances. The purpose for which the bid was to be withdrawn we do not consider material, nor do we regard as important the fact that the withdrawal resulted in no actual injury to the government. The agreement was entered into for the accomplishment of a project of which the government was ignorant, and whether or not the withdrawal would be detrimental was a matter of conjecture only. * * * *The agreement to withdraw was undoubtedly injurious in its tendency, and the policy*

contravened by it is only to be satisfied by declaring its invalidity.

"It appearing that the plaintiff has no cause of action, the case is remanded to the court below, with instructions to dismiss the suit."

In *Lucas* v. *Allen*, 80 Ky. 681, Lucas was clerk of the Board of Aldermen of Louisville. He professed to have information that would lead to a recovery from the city, by taxpayers, of certain taxes collected from them for an illegal purpose. He so informed the Allens, who were attorneys, and alleges that, in consideration of information to be given by him, and of his aiding in the preparation and prosecution of the suit for taxpayers against the city, they agreed to divide with him the fees they should receive in the suits. They brought suit and succeeded, and received $18,439.25 as their fee. Lucas filed his bill in equity for his share under the contract. The disclosure made was the furnishing of a copy of the ordinance on which the illegal assessments were made, of which ordinance the plaintiff was custodian The court say:

"Principle, analogy and authority unite in declaring contracts *which have an apparent tendency* to corrupt, bias, tempt or draw away public officials from the honest discharge of their duties as void, because in contravention of public policy.

"And we are of opinion that Lucas, who was an official of the city, charged with the custody and power to copy and attest the very ordinance on the authority of which the illegal assessments against the citizens were made, was forbidden by public policy to make the contract, whereby, if enforced, he would receive money for the disclosures he made and the services he rendered against the city whose employment he was in, and to which the law requires him to be loyal and true so long at least as in that employment, and *in so far as it furnished him, in the course of his duties, with the information by which he sought or may seek to profit himself. Steele* v. *Curle*, 4 Dana, 381; *Oscanyan* v. *Arms Co.*, 13 Otto, 262, and authorities cited."

Brooks v. *Martin* and *Sharp* v. *Taylor* were cited by counsel, but the court say:

"And we cannot countenance the claim that it is an accomplished fact, and that therefore the proceeds of the illegal undertaking and maintenance of the suit ought to be divided. A court of equity can never be made the instrument of dividing such acquisitions

between parties standing in the attitude which this record exhibits."

In *Forbes* v. *McDonald*, 54 Cal. 98, the plaintiff was one of five trustees of a mining company, two of whom had views opposed to the other two, plaintiff being the fifth. The defendants (two of the trustees) desired plaintiff to resign, and to fill his place with some friend of their own. It was agreed between the parties that, in consideration that plaintiff should resign and aid defendants in electing his successor, they would give their note for the amount of a debt due plaintiff from one Owens. All these things were done, and plaintiff sued on the note. The court say:

"It is not necessary to cite authorities to show that a contract is void if a portion only of the consideration is illegal. *It does not appear to us to be at all doubtful that if the whole or a part of a consideration be that a trustee resign his trust, the consideration is illegal.* It is *contra bonos mores*. Trustees of corporations owe duties to others besides themselves. They have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of that trust for them to be bought out of office. They may resign when they please, but they must not make profit or benefit to themselves in the matter of such resignation."

In *Noel* v. *Drake*, 28 Kans. 265, defendant (a national-bank director and president) agreed to sell plaintiff 114 shares of the stock of the bank at $140 per share, and, upon his purchase of the stock, to have him made cashier of the bank. Defendant having refused to perform, plaintiff brought suit, alleging various items of damage. The court says:

"The contract between Noel and Drake for such removal and sale must be held to be contrary to public policy. *The purpose and effect of the contract were liable to influence Drake in the decision of a question affecting the private rights of others by considerations foreign to those rights.* * * * In the relation of trust and confidence which Drake occupied as a director and president of the bank, which required him to look after the best interests of the bank and its stockholders, it was improper for him to be influenced by agreements with or considerations from a stranger in the selection of cashier, or in the discharge of any of his other official duties."

In *Bowers* v. *Bowers*, 26 Pa. St. 74, the plaintiff, being entitled to letters of administration of the estate of his son, of which he was

also a creditor, agreed that he would renounce his right to letters, and permit and procure letters to be issued to defendant, in consideration that defendant would assume and pay the debt of the estate to him. This was all done. The court say that the position of administrator is an *office*, and:

"If public policy forbids traffic in the office of postmaster, as was decided in *Filson* v. *Himes*, 5 Barr, 456, it will, for superior reasons, interdict barter in the more sacred trust of administration.

"But if administration of decedent's estate be not an *office*, it is strictly a *trust*, and as such is *not to be purchased for a price which creates in the trustee an interest adverse to the cestui que trust.*

* * * * * * *

"*The question here is not upon the legality of the administration, but upon the sufficiency of the consideration for the defendant's promise, and as that in its very nature endangered the purity of the trust, the law will not sanction it.*"

In *Miller's Appeal*, 30 Pa. St. 478, there was an agreement between the executor and trustee and the heir-at-law that the former should receive part of the estate in case the trusts of the will should be set aside by the courts. The court *held* the trusts void. Afterwards the heir-at-law cited the executor and trustee to account. The latter claimed to retain his share under the agreement. The court say, (p. 494:)

"A trustee, it is said, may bargain with his *cestui que trust* * * * especially if it (the contract) stipulate that he shall no longer act as trustee. But this principle has no application to this case, for here there was no dismissal of the trustee and no attempt to withdraw from his trust. *Nor did he bargain with his cestuis que trustent, who were the devisees in the will, but with the heir-at law who was their antagonist.* He bargained *against* his *cestuis que trustent* instead of treating with them. If a treaty with them for his own advantage would have been regarded with jealousy, how much more the traffic in which he engaged to their prejudice, whilst he continued their professed representative." And the agreement was *held* void.

In *Ellicott* v. *Chamberlin*, 38 N. J. Eq. 604, (in Court of Errors,) the plaintiff, a widow, agreed to pay $10,000 to defendant, who was named as one of two executors in the will of her deceased husband, if he would renounce his executorship, her motive being a

well-grounded fear that, if he should qualify and act, he would abuse his trust. He accordingly renounced, as did the other executor, (the latter without compensation,) and plaintiff was accordingly appointed administratrix with the will annexed. In execution of her agreement she paid, in money and by the assignment of a bond and mortgage, $7,500, the residue being evidenced by her note. The defendant having sued at law on the note, the plaintiff filed her bill in equity to restrain the action at law, and to reclaim the money already paid, and for a reassignment of the bond and mortgage. The bill was dismissed, the court saying, (p. 609:)

"There is no doubt that the agreement of Mr. Chamberlin to renounce for a consideration was illegal, not because of fraud or duress, as was urged before the chancellor, but because it is against public policy. It is a general principle, universally enforced, that trustees cannot use their relations with trust property to their personal advantage. An agreement to accept money or other valuable thing as consideration for violating or abandoning a trust, is illegal. A person named in a will as executor is not obliged to accept. He may voluntarily renounce for reasons that do not involve mercenary motives; but he has no right to make merchandise of the confidence reposed in him by a testator."

"In the case of *Porter* v. *Jones*, reported in 52 Mo. 399, it was held that a promissory note, whereof the consideration was an agreement to resign as administrator, with the view of having another appointed, was void as against public policy. The court said, in that case, that the agreement amounted to trafficking with an important trust; and although an administrator was not a public officer, yet he held a private trust as sacred."

The doctrine of the foregoing cases, viz., that it is the ***tendency*** of agreements which is controlling upon the question of their illegality as being against public policy, is well expressed in *Richardson* v. *Crandall*, 48 N. Y. 348, 362, as follows:

"In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the ***general tendency*** of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate."

And the same doctrine has often been affirmed by this court.

Thus in ***Marshall*** v. ***Balt. & Ohio R. Co.***, 16 How. 314, it is said, (p. 334:)

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal or which is inconsistent with sound morals or public policy, or which ***tends*** to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. * * * Hence the law avoids all contracts to pay money for procuring a marriage."

And (p. 335:) "Bribes in the shape of high contingent compensation ***must necessarily lead*** to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them," etc.

So, in *Wheeler* v. *Sage*, 1 Wall. 518, 530—

"The court was imposed on, and a combination formed, *the object and direct tendency* of which was to secure the title to the valuable real estate of an insolvent debtor at the expense and sacrifice of his creditors."

And in *Tool Co.* v. *Norris*, 2 Wall. 45, it is said, (p. 55,) of agreements, for compensation, to procure appointments to public offices:

"Agreements, for compensation, to procure these appointments *tend* directly and necessarily to introduce such elements. The law, therefore, *from this tendency alone*, adjudges these agreements inconsistent with sound morals and public policy."

And again, (p. 56:) "It is sufficient to observe, generally, that all agreements, for pecuniary considerations, to control the business operations of the government, or the regular administration of justice, * * * are void as against public policy, *without regard to the question whether improper means are contemplated or used in their execution. The law looks to the tendency* of these transactions, and *it closes the door to temptation* by refusing them recognition in any of the courts of the country."

And in *Trist* v. *Child*, 21 Wall. 441,—

"No one has a right to put himself in a position of temptation to do what is regarded as pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking."

And very recently this doctrine has been forcibly restated and affirmed, and *Fuller* v. *Dame*, cited and followed, in this court. *Woodstock Iron Co.* v. *Extension Co.*, 129 U. S. 643, 657, 662-3; *West* v. *Camden*, 135 U. S. 507, 513-4, 520-1.

VIII.

It needs no argument to show that in not one of the cases cited, whether in this or other courts, was the contract condemned as illegal more clearly against public policy, more clearly evil *in its tendency*, than the agreement which plaintiff alleges here. Whether regard be had to his private relation and duties as agent for the Dutch committee, or to his position as receiver and his duties to the court as a citizen and as its trusted representative, or to the opportunities and temptations which such a position offers the holder of it to enrich himself at the expense of his *cestuis que trustent*, or to the reproach and scandal to the administration of justice that would result if such contracts were permitted, there is no feature of illegality to be found in any one of the cases cited that is not present in the contract which plaintiff says he made.

And what would be the effect of such contracts, if upheld by the courts, upon the public interests? This court has more than once sounded its warning of the dangers that menace our political and social system from contracts that tend to corruption in the other departments of the government, national and state. Is the purity of the courts, of their officers,—their fiduciary officers,—and of their administration, less vital to the commonwealth than the purity of the legislative and executive departments? Is the danger too remote or too insignificant to be judicially taken notice of? As to its remoteness, if plaintiff's bill of complaint is true, the danger is imminent, is actually present. And even were plaintiff's case, as he alleges it, a solitary one, are betrayals of trust so rare in these days that their recurrence needs not to be guarded against? As to its insignificance, more than ten years ago it was computed and judicially declared, and in this court, that of fifty important railways in the eighth circuit, hardly six had escaped the hands of a receiver. Let this court impress the seal of its approval on such contracts as plaintiff alleges here, and what shorter, or safer, or more corrupt road to wealth than through the office of a railway receiver? The courts, it is true, may remain incorruptible. Their judges may continue to be as they have been, above pecuniary

temptation. But will they be above reproach? And how long will they be above suspicion?

IX.

Within the settled doctrine of the cases cited, the agreement in question, if ever made, was against public policy and void in its inception, *because of its evil tendency.*

X.

But this case does not rest on the mere *tendency* of the alleged contract. Such an agreement made by a receiver is in itself and in the very making of it a breach of trust, inasmuch as in making it the receiver assumes an attitude of hostility to the interests he is bound to protect. He clothes himself with interests and obligations which are at war with his duties to the court and his *cestuis que trustent*, and which disqualify him to hold his office. It is more than an express agreement to commit a fraud on the court. It is in itself the commission of a fraud.

XI.

And more than this. According to plaintiff's own testimony, his purpose from the beginning—indeed, his express agreement—was not merely to betray the trust reposed in him by the bondholders, but to corrupt the committee's agents, Messrs. J. S. Kennedy & Co., and seduce them from their duty. He says that in the conversation when the agreement was formed:

"I said then and there that John S. Kennedy & Co. were going to be the great factors in trying to get these bonds; the Dutchmen would never sell the bonds until it was recommended by John S. Kennedy & Co.; and I said they were very dear men, but they had to be interested in some way to recommend this thing before the bonds could be purchased of the Dutchmen; and no doubt this letter here" (of Aug. 23, 1876; Defts.' Ex. 140, p. 1492; "It might become a Canady Project, but that would be a mater of no moment to you or me, if we could make some money") "was a feeler to that object." (1361-2, Q. 57.)

And an examination of Farley's and Fisher's testimony to the conversation when the alleged agreement was made, shows that *this was just as much a term of the agreement* as anything

that was said. And plaintiff happily styles such an arrangement a "conspiracy," which would "implicate" and "criminate" Mr. Kennedy and Mr. Barnes. (1380, Q. 134; 1382, Q. 141.)

XII.

It has been argued that to make the agreement illegal because of the concealment of plaintiff's interest, there must have been an express purpose to conceal it. But in addition to the almost conclusive presumption that such concealment, so vital to plaintiff's retention of his office, must have been intended, the plaintiff has himself testified that in the inception of the alleged contract, "it was sacredly agreed" that entire secrecy should be observed.

XIII.

If we are correct in the foregoing positions, it is evident that it is absolutely immaterial whether, in point of fact, the plaintiff made known his interest to the bondholders before they sold their bonds, or whether he made false representations to them to induce them to sell at a lower price, or whether he committed any or all of the frauds to which such agreements necessarily tend. But as it has all along been contended by plaintiff's counsel that the test of the plaintiff's right to recover is not the tendency or even the express purpose of the agreement, but the quality of the acts done under it; as they have conceded that if plaintiff committed frauds in carrying it out, he cannot recover, it may be well to glance at some of the things done under the agreement. And it will be seen that, if plaintiff is to be believed, the worst tendencies of such agreements were realized in this case.

(1.) Bearing in mind that the plaintiff (as he says) dictated the policy of the associates, and at least, if an associate, he must have known it, and that he concurred in it without dissenting, we observe.

(*a.*) In the letter to Carp of Jan. 29, 1877, the plaintiff joined in representations disparaging the property, which he admits were untrue according to his knowledge and belief at that time. (*Supra*, 140.)

(*b.*) We have already considered at length the policy of the

associates in dealing with the bondholders and stockholders, using their great majority of bonds to depress prices; stopping the demand from St. Paul and thus breaking the market in Amsterdam; planning to recoup from the outstanding bonds and certificates the amount of "our loss by Litchfield"—i. e. the $500,000 paid for the stock. (*Supra*, 209-211.) Such action, instigated or concurred in by one in plaintiff's various fiduciary positions, was an actual, positive fraud on his *cestuis que trustent.*

(*c.*) The secrecy which plaintiff says he agreed on was actually practised. And, in addition, while the negotiations were going on *in which the prices for the Dutch committee's bonds were fixed*, he represented to J. S. Kennedy & Co. that he was not interested.

His receipt of their "confidential" letter of June 27, 1877, (Plff.'s Ex. 132, p. 289,) and his own reply of June 30th, (Defts.' Ex. 84, p. 1015,) are in effect a denial of any interest.

His permitting them to write to him of the situation and embarrassments of the committee, (as they did in the "private and confidential" letter of Oct. 2, 1877; Plff.'s Ex. 154, p. 310,) and to write other letters of the same import, was in effect a representation that he was solely in their interest, and not connected with the buyers.

His own letter of Sep. 26, 1877, (*supra*, 148, 158,) is an express denial of any knowledge of the negotiations which (as he says) were carried on under his own direction, and, if he was interested, must have been written to depreciate the value of the bonds in the opinion of J. S. Kennedy & Co.

His letter of October 23, 1877, (*supra*, 148,) was in effect a statement that he was not interested.

His letter of Feb. 15, 1878, (*supra*, 149, 170,) asking for "a short condenced statement of the contract between the Dutch Bondholders and Hill, Kittson & Co.," was in effect a representation that he was not among the "Co." in that combination.

His letter of Feb. 22, 1878, (*supra*, 149, 171-2,) in which he claims to have disclosed his interest, was a plain denial of any interest in the purchase. "It has been more than intimated to me that Mess. H. & K. would be pleased *to make* me interested in

their shares of what may result from this trade. My judgment is some of these Bond is Cheap at the price named, and others very much higher *than I would pay.*" This is a direct statement that he was not one of those who *had already contracted* to pay this "very much higher" price.

This letter was received by J. S. Kennedy & Co. just *after* the purchase had been concluded by the associates accepting, as sufficient in amount, the adhesions of bondholders already given in Holland, as Mr. Kennedy writes in his "confidential" letter of Feb. 25th, (Plff.'s Ex. 162, p. 317.) But even if it had been received before the purchase was closed—even if it told Mr. Kennedy that plaintiff had already become interested, still it told him that Mr. Farley had *not* been interested in the negotiations of the preceding summer and autumn, during which he had written the letters already referred to. And it was in *those earlier negotiations* that the prices at which the committee would recommend the bondholders to sell were arrived at. The prices in the proposal of Jan. 5, 1878, and in the contract of March 13, 1878, are the same named in Mr. Hill's telegram to Carp, of Sept. 29, 1877—the same which the committee had approved, and the bondholders had acceded to, in October, 1877. (Carp's Deposition, Ex. E. p. 539; Ex. G. p. 544; Deft.s' Ex. 122, pp. 35-6.)

(2.) Upon former arguments, however, the plaintiff's counsel have strenuously contended that as receiver and as general manager for trustees in possession, the plaintiff had a right to buy the bonds —*therefore*, he had a right to conceal his interest, to be a secret buyer. That he had a right to buy the mortgaged property—therefore he had a right to be a secret buyer. Even if this were so, still it is settled law that as agent and adviser of the committee and J. S. Kennedy & Co., he could not lawfully make a *contract with others* to be secretly interested with them in a projected purchase of the committee's holding, and to furnish them such facts, information and advice as would enable them to make the purchase on the most favorable terms.

But even if plaintiff were merely receiver and general manager, it cannot be denied that his interest in the purchase of the bonds

and property, *even openly*, would make the purchase voidable—that he could be compelled to relinquish it. And what sort of a right to purchase is that where the buyer can be compelled to surrender what he bought? And *why* can plaintiff be compelled by the bondholders to surrender? Because his purchase is a violation of his duty to them, and a fraud—actual or constructive according to the means used by him—upon them. And if his purchase is a breach of duty and an actual or constructive fraud, an agreement with others whereby he contracts for an interest—open or secret—in such a purchase to be made, is an agreement to commit a fraud upon them. And if a secret purchase by a trustee *per interpositam personam* is *actually* fraudulent, (*Michoud* v. *Girod*, 4 How. 503, 553,) then plaintiff's alleged agreement, if he stands on the footing of a trustee, was an agreement to commit an *actual* fraud on his *cestuis que trustent*—and who shall say that such an agreement is lawful?

The cases already cited show that many things which are lawful if done openly are unlawful if done secretly. Whether concealment in any case and of itself renders a transaction fraudulent depends solely on whether, in that case, the party practising it was under a duty to disclose. And the position that a railway receiver is under no disability to buy *openly* the mortgage bonds as a means of acquiring the mortgaged property, or to buy the property by means of the bonds purchased, we have already shown to be untenable. It is wholly immaterial that plaintiff was not charged with the sale of the properties under the foreclosure decrees. *Eyre* v. *McDonell*, 15 Ir. Ch. 534, 548, 551; *Alven* v. *Bond*, Flan & Kelly, 196, 213.

In the first of these cases the court says (p. 551) that "the powers of a receiver are greater than those of almost any other person in a fiduciary capacity." This observation is especially true of a railway receiver, who "generally takes the property out of the hands of the owner, and operates the road in his own way, with an occassional suggestion from the court, which he recognizes as a sort of partner in the business," (*Barton* v. *Barbour*, 104 U. S. 138,) but—unless the court sustains the contention of plaintiff in this case—not a partner in that branch of the "business" which is

involved in this litigation. See also *Davis* v. *Gray*, 16 Wall. 203, 217-8.

(3.) And even if no concealment were actually practised on *the bondholders*, the fact is asserted by plaintiff himself that concealment was practised on the court. No proof of this fact was needed. *Res ipsa loquitur.* The character of the judges of the circuit court, of the very eminent jurist who then adorned the bench of the eighth circuit, is in itself proof demonstrative that he did not continue the plaintiff in office, did not make the order of May 31, 1878, for completing the line, did not expressly charge plaintiff with the duty of exacting from Messrs. Smith, Stephen, Kittson and Hill strict compliance with the terms of that order, did not confirm the decretal sale, with any knowledge or suspicion that his receiver was a secret partner with the men he was set to watch, was secretly interested in the purchase of the bonds and of the property. And so long as Judge Dillon was on the bench, this claim of plaintiff was never asserted in the circuit court. At the last term held by Judge Dillon in Minnesota, this sale was confirmed. His resignation had been tendered, to take effect a few weeks afterwards, and the order of confirmation was one of the last acts of his judicial life. It was with good reason that plaintiff brought his first suit in the state court, alleging himself, too, to be a citizen of Minnesota. And when that suit had gone against him and had been dismissed, and the judge whose confidence he says he had betrayed had retired from the bench, he first appears with his claim in the circuit court, alleging himself to be—what he has always been—"of Dubuque, Iowa, and a citizen of the state of Iowa."

And it needs no argument to show, (even were the uninterrupted concealment not plenary proof of the original purpose to conceal,) that if the agreement alleged in the bill was ever made, it was and must have been understood by the plaintiff and all the parties that success in concealing it from the court was the hinge on which the entire enterprise must turn, and this concealment must have been a cardinal point in their purposes and their agreement.

And that the concealment thus purposed was actually practised and was wilful, the plaintiff himself testifies. (*Supra*, 45, Q. 95-7; Record, 1390, Q. 179.)

(4.) If actual fraud in carrying out a contract has any bearing on the question of its illegality, this alleged contract is even more illegal in this respect than any in the reports. It is far worse than *Bartle* v. *Coleman*, 4 Pet. 184; *Randall* v. *Howard*, 2 Black, 585; *Wheeler* v. *Sage*, 1 Wall. 518; or *Selz* v. *Unna*, 6 Wall. 327.

The fraud which, if plaintiff is to be believed, was practised on the court, was not merely constructive. Where disclosure is a duty, suppression of truth is the assertion of falsehood. From the day this alleged agreement was made, and if it was made, plaintiff's retention of office was a daily representation that he had not acquired secret interests that disqualified him from holding the confidence of the court or performing his fiduciary duties.

On the plaintiff's own petition, (Defts.' Ex. 159, p. 1552,) the court, on April 18, 1878, made an order appointing a commission to inquire and report: "2. The names of the owners of the bonds under said mortgage," (i. e. the $15,000,000 mortgage,) "and the number and amount held by each owner or representative of each owner." (Plff.'s Ex. 202, p. 408; *supra*, 189.) The question would not have been more plainly put by Judge Dillon had he said: "Mr. Farley, are you interested in those bonds?" Plaintiff was bound by his oath as receiver to answer this question and to answer it truly. He was silent. He allowed the commission to make a report stating the interest of Messrs. Smith, Stephen, Kittson and Hill, accompanied by a copy of their agreement with the Dutch committee; a report that in effect said the receiver was *not* a member of that combination or interested in its enterprise. (Plff's Ex. 203, pp. 411, 412-4.)

He was present at Des Moines when the reports were made the subject of a discussion between Judge Dillon and Mr. Hill and his counsel, in which he also took part. He was present at Davenport when the order of May 31, 1878, was made. And when he heard that order dictated by Judge Dillon, and afterwards read aloud, with its recital "that George Stephen, Donald A. Smith, Norman W. Kittson and James J. Hill represent and show to the court that *they* are the equitable owners of $11,400,000 of the $15,000,000 issue of bonds," under the agreement of 27 articles with the Dutch committee, he joined in that representation, which he says he knew was

false. (*Supra*, 191.) When he received the judge's charge, (*supra*, 192:) "Mr. Farley, remember in this matter you are *my* man, and you must see to it that this order in all respects is carried out," was not his concealment of his interest as direct, positive and unqualified a deceit and fraud upon the court as any representation that language is capable of expressing? What element of actual fraud was wanting?

Were the frauds upon the court in *Randall* v. *Howard* and *Wheeler* v. *Sage* such as to bar the approaches to a court of equity against the men who had committed them, and yet this plaintiff be a welcome suitor? The guilty parties in those cases owed to the administration of justice only the duties common to every citizen. This plaintiff owed all those duties and in a higher degree. And he owed others. He was the sworn officer of the court, its trusted representative, owing to it a limitless good faith. He was a member of the household of justice, and his infidelity to its head was as petit treason.

XIV.

In any possible view of the case, therefore, the alleged agreement on which the plaintiff relies was an agreement upon an illegal consideration, and was in its inception illegal and utterly void. And the means which plaintiff says were in fact used in carrying it out and acquiring the property of which he now claims a share under that agreement, were infected with fraud both constructive and actual.

SECOND.

If the alleged contract was illegal and void in its inception, and a mere nullity, can the plaintiff nevertheless maintain this bill against the other parties thereto for an accounting and division of the profits resulting from the execution of the provisions of that void and illegal contract?

I.

It would seem that to state such a question is to answer it. Plaintiff can have no claim to any share of those profits except through the contract alleged in his bill. His first step in his suit is to show a contract. If he fails to show that any contract was ever made, he fails to show any right whatever. But if the contract he alleges is an illegal contract, it is, *ex vi termini*, no contract whatever. To show an illegal contract is to show no contract at all.

That a contract which is illegal because against public policy is, as between the parties to it, utterly void, is the doctrine of all the cases we have cited. "*It has long been settled* that a promise made in consideration of an act which is forbidden by law is void. * * * "*It has never been doubted* that a note given on a consideration which is prohibited by law is void." *Craig* v. *Missouri*, 4 Pet. 410, 436-7, *per* Marshall, C. J.

"If either of the portions of the consideration on which the notes were given was illegal, the notes are void *in toto*. Such is the elementary rule, for which it is unnecessary to cite authorities." *Hanauer* v. *Doane*, 12 Wall. 342, 345, *per* Bradley, J.

There can be no question of voidability, or of affirmance or ratification. "A transaction originally unlawful cannot be made any better by being ratified." *U. S.* v. *Grossmayer*, 9 Wall. 72, 75. As between the parties to it, a contract which is illegal as against public policy is as absolutely void as if so declared by express statute. There can be no middle ground. This contract, as between these parties, is, and always has been, either a valid contract or a nullity.

Misleading expressions are sometimes used in cases on such contracts—as that "equity will not lend its aid to enforce a contract which is illegal," as if there existed somewhere in equity a discretion to entertain suits to enforce illegal contracts. Nothing can be farther from the truth. A court of equity has no more power to enforce an illegal contract than a court of law has power to refuse to entertain an action on a valid promissory note.

If this were a suit at law, on an express promise to pay plaintiff a sum of money, great or small, in consideration that he would

secretly use his information, his powers, and his influence as receiver to enable the promisors to acquire the mortgage bonds and the mortgaged property in his charge, the money to be paid when the property should have been acquired, there can be no doubt that this court, or any other court into which such an action should be brought, holding (as it must) the contract to be illegal as against public policy, would not hesitate an instant in its decision that the action would not lie.

But the only difference between such a case and this is that here the contract alleged is not for a stipulated sum of money, but for an interest in the enterprise and in the profits. The consideration and the object of the two contracts are the same and are alike illegal. Is a promise to pay money on an illegal consideration a void promise, but a promise, on the same illegal consideration, to share an unlawful enterprise and its profits with the promisee a valid promise? Will an illegal consideration that cannot support a promise to pay money give rise to such a contract as equity will specifically enforce? Or will equity enforce a trust in contravention of law? or entertain a bill for division of profits, or contribution in respect of losses, of an illegal partnership—even though the partnership business be closed?

That equity will not specifically enforce an illegal contract was held in *Randall* v. *Howard*, 2 Black, 585, and cannot be doubted.

That it will not enforce an illegal trust was held in *Ottley* v. *Browne*, 1 Ball & B. 360, and is beyond dispute. *Warren* v. *Van Brunt*, 19 Wall. 646.

That it will not enforce an illegal agreement for partnership between the parties to it by enforcing contribution for losses, was held in *Bartle* v. *Coleman*, 4 Pet. 184.

And that it will not enforce an illegal agreement of partnership between parties to it by enforcing division of profits, was held in *Bartle* v. *Coleman*, and in *Wheeler* v. *Sage*, 1 Wall. 518.

And that a court of equity regards an agreement for an illegal partnership—for a partnership to carry on an illegal business—inoperative to create a partnership, or to clothe the parties to it

with any of the rights of partners, is also held, and is the one ground of the decree, in

Knowles v. *Haughton*, 11 Ves. 168, (1805,) by Sir Wm. Grant, overruling *Watts* v. *Brooks*, 3 Ves. 612.

Armstrong v. *Armstrong*, 3 Mylne & Keen, 45, (1834,) by Sir John Leach and Lord Brougham. (And see *Armstrong* v. *Lewis*, 2 Cr. & Mees. 274, by Lord Denman, giving the decision of the judges in the Exchequer chamber.)

Ewing v. *Osbaldiston*, 2 Mylne & Cr. 53, (1836,) by Lord Cottenham.

Gordon v. *Howden*, 12 Cl. & Fin. 237, (1845,) by Lords Lyndhurst, (Chancellor,) Brougham and Campbell.

Fraser v. *Hill*, 1 Macqueen, 392, (1853,) the opinion being given by Lord Chancellor Cranworth.

Sykes v. *Beadon*, 11 Ch. Div. 170, by Sir Geo. Jessel, M. R. reviewing *Sharp* v. *Taylor*, 2 Phillips, 801.

Snell v. *Dwight*, 120 Mass. 9.

Dunham v. *Presby*, Id. 385.

Atcheson v. *Mallon*, 43 N. Y. 147.

Woodworth v. *Bennett*, Id 273.

Root v. *Stevenson*, 24 Ind. 115.

Craft v. *McConoughy*, 79 Ill. 346.

Lucas v. *Allen*, 80 Ky. 681.

Watson v. *Fletcher*, 7 Gratt. 1.

King v. *Winants*, 71 N. C. 469. And in many other cases.

In *Sykes* v. *Beadon*, *supra*, Sir George Jessel refers to the old case of *Everet* v. *Williams*, which, if not authentic enough for authority, has its value as a parable. It is thus stated in 2 Pothier on Obligations, by Evans, p. 3, and in 1 Lindley, Partnership, *183, note:

"The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc ; that the defendant applied to him to become a partner; that they entered into partnership, and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally bear all expenses on the roads, and at inns, taverns, or alehouses, or at markets or fairs. 'And your orator and the said Joseph Wil-

liams proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the said Joseph Williams told your orator that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; and they accordingly went and met with the said gentleman, and after some small discourse, they dealt for the said horse, etc.; that your orator and the said Joseph Williams continued their joint dealings together until Michaelmas, and dealt together in several places, viz., at Bagshot in Surrey, Salisbury in Wiltshire, Hampstead in Middlesex, and elsewhere, to the amount of £2,000 and upwards.' The rest of the bill is in the ordinary form for a partnership account."

The bill is said to have been dismissed with costs to be paid by the counsel who signed it, and the solicitors for the plaintiff were attached and fined £50 apiece.

II.

But it is argued that because the purpose for which the agreement was made—the buying of the bonds and the property—has been carried out; because the illegal consideration—the plaintiff's promise to secretly use his position as receiver and general manager to carry out that purpose—has been executed, this suit may be maintained.

The proposition has been heretofore stated in the argument for plaintiff, as follows:

"*Even though the original agreement were invalid as contrary to public policy, still, having been completely carried out and executed, defendants will not be permitted to defraud the complainant of the profits in their hands by raising this objection.*"

Or, to state the same proposition in other terms:

Where an agreement is illegal because its consideration is an undertaking to do unlawful acts, the party agreeing to perform

those acts may, upon full performance of them, *and because* of such performance, recover the price agreed to be paid therefor.

As this rule, with the substitution of "lawful" for "illegal" and "unlawful," would be the same rule which applies to lawful contracts, it follows that upon full performance of the illegal executory consideration of an executory contract, the party performing stands on the same footing in respect of a recovery on the promise of the other party as if the consideration had been legal. In short, an executory contract which is illegal, because founded on a promise to do unlawful acts, is legalized by the performance of the unlawful acts. An agreement which is illegal because its purpose or its tendency is the commission of unlawful acts, becomes legal upon and because of the commission of the unlawful acts to which it tended.

An agreement which provides for or tends to the commission of unlawful acts is against public policy, illegal, and void. *Therefore*, a party to the agreement, who has performed such unlawful acts, may recover from the other party the amount named in the agreement as the price of such performance.

That this is a fair statement of the proposition of plaintiff's counsel, if applied to a promise to pay money in consideration of the performance of an act forbidden by law, cannot be questioned. Nor can it be questioned that, as thus stated, or however stated, the proposition, as applied to *such* contracts, is not law. And we doubt if any counsel has ever asked any court to hold it to be law.

But the only difference between the proposition as stated by plaintiff's counsel and as stated by us is that, in the one, the contract provides that, on performance by plaintiff of unlawful acts, and because of such performance, the defendant shall pay him a sum of money; while in the other, the contract provides that upon performance by plaintiff of unlawful acts, and by reason of such performance, he shall be entitled to a share in the property obtained by defendant by means of such unlawful acts.

Ordinarily, this difference between two promises, on the same illegal consideration, would hardly be ground on which to hold one of them legal if the other was illegal. An agreement void at com-

mon law for maintenance was never deemed to be made valid by reason of its being also champertous.

But the plaintiff's counsel insist that their proposition, and hence the distinction between this case and *Marshall* v. *Balt. & Ohio R. Co.*, *Trist* v. *Child*, *Tool Co.* v. *Norris*, *Oscanyan* v. *Arms Co.*, *Harrington* v. *Victoria Graving Dock Co.*, *Fuller* v. *Dame*, (to say nothing of the other *cases at law* we have cited and hundreds we might cite,) is sustained by three decisions which they cite. Even then they show no distinction between this case and *Bartle* v. *Coleman*, *Randall* v. *Howard*, *Wheeler* v. *Sage*, and the many cases on illegal contracts we have cited, and little, if any, between this case and *Meguire* v. *Corwine*, 101 U. S. 108.

The cases on which the plaintiff relies are *Sharp* v. *Taylor*, 2 Phil. 801, (1849;) *Brooks* v. *Martin*, 2 Wall. 70; *Planters' Bank* v. *Union Bank*, 16 Wall. 483. The second of these cases rests upon the first, the third upon the second, and the last two profess also to be based on certain English cases, which, however, do not support them if they are to be construed as maintaining the rule for which plaintiff here contends.

We have little doubt of our ability to satisfy the court that these cases do not maintain any such rule, and that certain expressions of the court, especially in *Sharp* v. *Taylor* and *Brooks* v. *Martin*, have been misunderstood by plaintiff's counsel, as they have been misunderstood by some courts and misapplied by others.

III.

Before considering what those cases really decide, and what the reasoning and *dicta* in them really mean, it may be well to state and illustrate a few elementary rules as to which there can be no dispute, and which, in their application to the cases in question, will, as we think, fully bear us out in our attitude towards those cases.

(1.) And *first*. Since the question whether a contract contravenes public policy, and is illegal and void, is to be determined by its *tendency*, without regard to the acts done in execution of it, and also because any contract is either legal or illegal *when made*, it follows that

A contract which is illegal in its inception cannot be made legal by any subseqent conduct of the parties to it.

"The agreement, being illegal and absolutely void at the time it was made, can derive no force or validity from events which happen afterwards." *Kennett* v. *Chambers*, 14 How. 38, 51, per Taney, C. J.

The case cited strikingly illustrates this rule, as do also *Evans* v. *Richardson*, 4 Mer. 469; *Scholefield* v. *Eichelberger*, 7 Pet. 586, 594-5; and *Coppell* v. *Hall*, 7 Wall. 542. In each of these cases an action on a contract, illegal when made, was defeated for that reason, though, when suit was brought, (and, in *Coppell* v. *Hall*, when performance was demanded and refused,) such a contract might lawfully have been made.

And where defendant agreed in writing to pay plaintiff $800 not to bid against him for a prison-labor contract, in case he should get such contract, and plaintiff sued for the $800, the court, holding the agreement void, also say, (per Devens, J.:)

"Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose which they must have contemplated when it was made. Its validity is tested, not by its results, but by its objects, as shown by its terms." *Gibbs* v. *Smith*, 115 Mass. 592.

Of course, this rule does not prevent the parties to an illegal contract from discarding it and making a new contract embodying so much of the consideration and purposes of the original contract as were free from illegality—if any such there were.

(2.) And *secondly*, and for the same reason,

A contract legal in its inception will not be made illegal by anything done in carrying it out, or by any subsequent illegal agreement between the parties.

(Of course, if the subsequent illegal agreement is in effect a modification of the former legal one, so that thenceforth the two are united in one inseparable contract, that contract, having its inception at the date of the second agreement, will thenceforth be the only contract between the parties, and will be illegal.)

This *second* rule is illustrated in a series of English cases on pawnbroker partnerships, which will be fully stated under another

rule, and by *Wetherell* v. *Jones*, 3 B. & Ad. 221. (And compare *Foster* v. *Taylor*, 5 B. & Ad. 887, 899.)

In some of the reported cases these two rules (and especially the first) might on a casual reading seem to have been departed from. In a suit on any contract (legal or illegal) the plaintiff must prove (if put in issue) the making of the contract and the performance of the consideration. And so in most cases proof has to be made of the acts of the parties under the agreement, not merely to show performance, but often to prove the agreement itself. (See the English pawnbroker cases, *infra*.) And in nearly if not quite all the cases, the wisdom and the reason of the rule which pronounces agreements having an evil tendency to be illegal is more than justified by the proof which shows how fully the tendency was realized in the particular case. And hence, as is natural, the indignation of the court is aroused and its moral sense shocked by the things done, and at them and at the agreement as *resulting in them*, and not as merely *tending to them*, it aims its denunciations.

(3.) And *third*. The circumstance that money or property is the subject-matter of an illegal agreement, or has been paid as the consideration of an illegal agreement, or is the fruit of unlawful transactions in execution of an illegal agreement, does not preclude such money or property from becoming the subject-matter of subsequent valid contracts between the parties (or either of them) and third persons, or between the parties to the illegal agreement themselves.

(*a*) This rule, also, seems to have been sometimes overlooked by the courts, if we may reason from unguarded language in their opinions. Just as at common law a cartwheel that occasioned a man's death was offered as a deodand, and just as the Nibelungen hoard was fabled to bring woe to its possessor, so the courts sometimes speak as if the illegality of an agreement—of the consideration and the promise—inhered in the "accursed gold" paid in consideration, or the ill-gotten gain, proverbially unprosperous, that was realized as the fruits of unlawful transactions under it,—as if the "fruits of iniquity" were in themselves iniquitous. And other expressions would indicate that parties to an illegal agreement—especially if they carry it out in unlawful acts—suffer a "*capitis*

diminutio," incur a disability to contract with each other at all, or to contract with third persons as to the money or property so realized, and especially to make contracts with each other with respect to such property, or to acquire any contract rights against each other. They are called "wrong-doers" and the property "the fruits of iniquity," sometimes in cases where the suit is on a subsequent contract, on a new and lawful consideration, and for a lawful purpose, though having for its subject-matter property which was, it is true, the gains of unlawful traffic, but which has since been the subject of honest trade.

It may be well, therefore, briefly to discuss and illustrate this rule.

The illegality of an agreement lies in its consideration and its purpose.

If A hires B with money or property to do an unlawful act, and pays him in advance, no taint of illegality infects the money paid. And the consideration, (which is not the money but the *act* of payment,) in itself colorless, is made unlawful solely by the unlawful purpose of the parties—viz., to effect the commission of an unlawful act.

So, if A places money or property in B's hands to be used in the commission of an unlawful act—as the bribery of a legislator. In each case the delivery of the money or property to B is unlawful because made for an unlawful purpose, and B's promise in either case is void both because based on an illegal consideration, and because itself a promise to do an unlawful act.

And so where B promises to do an unlawful act, and A, in consideration thereof, promises to pay B, upon performance, a sum of money, or to divide with him the money or property which A may acquire by means and as a result of the unlawful act. Here A's promise is void because of the illegal consideration—B's unlawful promise—and because made with an unlawful purpose, viz., to secure the doing of an unlawful act.

But no illegality inheres in the money paid or property delivered, in any of these cases, or in the property acquired by the unlawful act. The money or property paid or delivered in advance as the

price of an unlawful act may be the subject of lawful contracts by the receiver, either before or after the doing of such act. If money, he may lend it and take a note, and the note (if it has no other defect) will be valid. If property other than money, he may make a valid contract to sell it, which he can enforce against the buyer.

And so the money or other property realized by the parties, or either of them, to an illegal agreement, from an unlawful act, or from a series of unlawful transactions amounting to a business, in execution of the illegal agreement, may become the subject-matter, or its payment or delivery may become the consideration, of lawful contracts.

Thus if A and B agree to defraud C, or to carry on an unlawful business, and put their agreement into execution, and accomplish the fraud on C, or conduct the unlawful business, and realize money or property thereby, they may lend the money or sell the property, or either of them may lend or sell the share he has received of the money or property, to a third person, and the contract of loan or sale will be valid, if made for a lawful purpose.

And as the money or property so realized may become the subject-matter, and its payment, delivery or conveyance the consideration, of subsequent valid contracts with third persons, the same money or property may become the subject-matter, and its payment, delivery or conveyance, or an agreement to pay deliver or convey it, may become the consideration, of a valid contract between the parties to the original illegal agreement themselves. The property is not tainted, nor are persons who have made an illegal agreement precluded thereby from carrying out former lawful contracts, or making future contracts, even with each other, even concerning the fruits of an unlawful act done, or an illegal business carried on, in execution of the illegal agreement.

Of course, such contracts are subject to the same conditions as other contracts. They must be on a legal consideration and for a lawful purpose

The *first* condition would exclude all contracts having no other consideration than the illegal agreement, or the original consideration or promise of that agreement. For instance, if A hires B to

obtain for him a government contract, and promises to pay him one-half the profits realized on such contract, and the contract is obtained, and results in a profit to A of $10,000, and A, instead of paying $5,000, according to agreement, gives him his note for that sum. The note, having no other consideration than that for A's previous promise, (which was illegal,) has no consideration at all, and is not a valid contract. (Compare *Brown* v. *Tarkington*, 3 Wall. 377.)

But supposing that A pays to B the $5,000, and the next day, being in sudden need of money, borrows the same money from him, giving his note for its repayment, the note is good.

And it would seem that the case would not be different, if before the completion of the government contract—before "the illegal transaction had been completed and closed," the parties should agree on $5,000 as the sum that should be paid B, and A should pay it—whether out of money received from the government or not—and the next day, to meet an unexpected demand, should borrow the same money from B, and give B his note. No reason is apparent why the note would not be good.

The *second* condition would exclude any contract made for an unlawful purpose, whether to carry out the unlawful transactions contemplated by the original agreement or not. And since, when those transactions or that business is closed, a new contract is hardly capable of aiding to carry out the unlawful purpose of the original agreement, contracts subsequently made are less open to suspicion on that ground. But if it clearly appears that a contract on a valid consideration was not made in aid of the unlawful purpose of the original illegal agreement, or for any other unlawful purpose, it can make no difference in its validity whether it was made before or after the unlawful business was closed.

Again: Parties forming an illegal agreement for a partnership in an unlawful business—*e. g.* conducting a lottery—may, during the continuance of the business or after its close, invest a part of the profits in real estate, taking title in their individual names, as tenants in common. Or, after a division of profits, each may put his share, or a part of it, into the capital stock of a new partnership,

formed by themselves alone or with a third partner, for the transaction of a lawful business. And while they are still carrying on the lottery business, one of them may file his bill against the other for partition of the real estate, or may file his bill for an accounting of the business of the new partnership and a division of the profits. In neither suit would plaintiff's title or right to relief rest on the illegal agreement for the lottery partnership, or on any of the transactions of that business. In one case, his title would rest on the deed of the land from the common grantor; in the other, on a contract for a partnership in a lawful business. In neither case would it be any answer to the bill to allege that *the property involved* was affected with the taint of illegality by reason of the lottery partnership agreement or the business done under it; and in neither case would an inquiry into those matters be necessary or permitted.

The distinction between suits to enforce the executory provisions of an illegal agreement and suits to enforce executory contracts on lawful considerations and for lawful purposes, but of which the profits of the unlawful transactions under the illegal agreement form the subject-matter or enter into the consideration, or growing out of the payment of the losses in such illegal transactions, might be illustrated by instances almost infinite in their variety. In several English decisions which have occasioned much discussion and some controversy, this distinction has been applied in cases differing somewhat in their facts from the instances we have put. Those cases will be considered at a further stage of our argument.

(*b.*) From the foregoing discussion, it appears that—

1. The test of the validity of an agreement dealing with the proceeds of unlawful transactions had under an illegal agreement is not at all, whether the unlawful transactions are completed and closed, but solely whether the new agreement is on a valid consideration and made for a lawful purpose.

2. Where two parties make an agreement for the transaction of business on joint account with third persons, and those transactions are had and result in profits which come into possession of one of the parties, and the other brings suit to recover his share as fixed by their agreement, the question is *not* whether such transactions

with third persons were lawful or unlawful, or whether they are closed, but solely whether the agreement between plaintiff and defendant, in the execution of which the transactions were had and the profits realized, and on which the plaintiff founds his claim, was, in its inception, a legal or an illegal, a valid or a void, agreement.

(4.) And as the making of an illegal agreement does not preclude the parties from making subsequent lawful contracts in respect of the profits realized from unlawful transactions with third persons in execution of the agreement, so, conversely—

Fourth. The circumstance that property has been acquired by parties (or one of them) to an illegal agreement, by means and as the fruit of unlawful transactions with third persons in execution of such agreement, will not preclude such property (1) from becoming, upon its acquisition, *ipso facto*, subject to the provisions of a subsisting legal contract between the parties to such illegal agreement, and made prior thereto; or (2) from becoming in like manner subject to rights of the parties arising from a common or joint ownership, existing prior to the illegal agreement, of the property by the use of which in the unlawful transactions the fruits of such transactions have been realized.

The first branch of the rule is illustrated by the case of a banking partnership, formed to do a lawful business, which makes usurious loans, or of a firm of livery stable keepers who let horses on Sunday; the loans having been repaid, and the hiring paid for, the money so received is to be treated just as if derived from lawful transactions.

An instance under the second branch would be where a vessel owned by several is employed in illegal freighting, and one part owner receives the freights. He must account therefor to the others.

The reason is plain. In each case the money has arisen from unlawful transactions, but plaintiff's *title* to a share of it is not founded on those transactions or any illegal agreement, but on his title to the ship.

It is clear that the cases under this fourth rule stand on the same

ground as those under the third, viz.: that an illegal agreement does not taint anything not embraced in it or founded on it, and for this reason does not deprive a party to it of any rights, whether incident to ownership of property, or growing out of prior or subsequent independent contracts of the parties with third persons or with each other.

This is strongly stated by Chief Justice Marshall, in *Armstrong* v. *Toler*, 11 Wheat. 258, 269-270.

This *fourth* rule is abundantly sustained by a series of English cases arising on the statute 39 & 40 Geo. 3, *c.* 99, in regard to pawnbrokers. This act requires that the name of every partner in a pawnbroking concern shall appear over the door of the premises, and be inserted in the license and the pawn tickets, etc. The cases mentioned are suits for partnership accounting between pawnbrokers. In each case it was the fact that the name of the partner by or from whom an account was sought did not at any time appear in any of the places where the law required it to appear, so that the business in fact done was in contravention of the act. In the first case it was settled that an agreement for a partnership in carrying on the business contrary to the act would be illegal, and would confer no rights on either party; but that if the parties, when making the original partnership agreement, did not make it for the purpose of carrying on a secret partnership, the validity of the agreement and of the partnership, and the rights of the partners, would not be affected by the fact that some or all of the business of the partnership was illegally done.

And as the partnership articles did not express the illegal purpose, the inquiry was as to the existence of a contemporaneous collateral agreement for secrecy.

The first of those cases was *Armstrong* v. *Armstrong* and *Lewis* v. *Armstrong*, 3 Mylne & Keen, 45, (1834,) before Sir John Leach, M. R., and, on appeal, before Lord Brougham. An issue as to the fact whether, in making their original agreement, the parties contemplated a secret partnership, was sent for a trial at law, and the decision in the Exchequer Chamber on the exceptions at the trial is reported, *Armstrong* v. *Lewis*, 2 Cr. & Mees. 274.

In this case Lord Brougham says, (3 Myl. & K., 64:)

"If a person agrees with another to be a secret partner in the business of a pawnbroker, he agrees to do that which is illegal and punishable by 39 & 40 Geo. 3, *c.* 99, an act containing provisions highly beneficial, and bringing the trade in question under regulations which are wholesome to the community. * * * Any agreement of this sort, therefore, is unlawful, can convey no rights in any court to either party, and will not be enforced by decisions at law or by decree here in favor of one against the other of persons equally culpable."

And he goes on to say:

"If, as in the present instance, we have before us a contract of partnership wholly silent upon the statutory obligation to make the names public over the door, we have no right to argue from the omission that an infraction of the law was intended; on the contrary, we are rather bound to believe that the compliance with the law, being taken for granted as a matter of course, was not expressly mentioned in the articles, as being thought superfluous.

"*If, again, such a contract, legal in itself, has been made, nothing done afterwards, how illegal soever, can operate to make the contract unlawful.*

"But where the acting of the parties is illegal; where, the contract being silent, the law is broken under it, though not by force of it, there arises a very natural suspicion that the written articles, though true as far as they go, do not contain the whole truth, and that another agreement was entered into, collateral to the one in writing, and to which the illegal acting may be referred."

And, after examining the evidence, he says, (p. 67:) "the existence of both agreements, the open and the secret, is clear, and they were parts of one contract wholly illegal."

In *Gordon* v. *Howden*, 12 Cl. & Fin. 237, (1845,) the same question was presented. It was conceded that the plaintiff's name never appeared in the conduct of the business, and that all the business was unlawful, and the only dispute was as to whether the *contract of partnership* "was a secret partnership for the purpose of carrying on the business of pawnbroking," and the lords, upon a review of the facts, held that "it was to be a secret partnership from the very terms of the contract." This case was decided by Lord Brougham, who heard *Armstrong* v. *Armstrong*, Lord Lyndhurst, before whom, as chief baron, *Lewis* v. *Armstrong* was tried, and Lord Campbell, who was on the losing side in those cases.

Fraser v. *Hill*, 1 Macqueen, 392, (1853,) was a like case. It was argued by eminent counsel for respondent that the exception taken at the trial was equivocal, because "it might mean either that the contract was illegal in its inception, or it might mean that, although not illegal in its inception, the mode of carrying it on had been illegal. *But the mere mode of carrying it on would not have been sufficient to make the contract itself illegal.*" To which Lord Cranworth, (chancellor,) responded. "*No—not though the illegality were ever so soon after the date of the contract.*" And see pages 396, 397, 399, of the report

(5.) We have not deemed it necessary to discuss the question whether, even where the plaintiff bases his claim on a valid contract, there may not be cases where, on account of peculiar iniquity in his subsequent transactions in the aquisition of the property in dispute, (such transactions being closed,) a court of equity would deny him relief by the application of another rule, viz., that a plaintiff in equity must come into court with clean hands. Such discussion would be quite foreign to the present inquiry.

IV.

The cases upon illegal contracts which bear upon the cases of *Sharp* v. *Taylor*, *Brooks* v. *Martin*, and *Planters' Bank* v. *Union Bank*, and upon this case, may, therefore, be divided into three classes.

(1.)

Cases where the original agreement was illegal, and one party to it sues the other, *on the agreement*, to recover money or property resulting from the transactions contemplated by the agreement, and had in execution of it.

We know of no instance where such a suit has been sustained.

(2.)

Cases where the plaintiff sues on an alleged lawful contract, to recover the fruits of subsequent unlawful transactions had with

third persons, as coming under the operation of the original lawful contract; or, not suing on any express contract, claims such fruits as an incident to his title to property acquired prior to the illegal transactions and used in carrying them on.

(3.)

Cases where an illegal agreement has been made, but the plaintiff seeks to recover, not on that agreement, but on a subsequent collateral agreement, on a new consideration, made between the parties, or by them or one of them and a third person, relating to the subject-matter of the original agreement, or to property acquired or losses incurred by the parties to the illegal agreement in their transactions with third persons in the execution of it.

We now proceed to discuss the cases cited against us.

V.

THE CASE OF SHARP *v.* TAYLOR, 2 Phil. 801.

This was as follows: The Victoria, an American ship, having been stranded at the port of Liverpool, and the agents of the owners having resolved to sell her at auction as she lay, "plaintiff and the defendant Taylor agreed to bid for her on their joint account, and, in case they became the purchasers, to repair and refit her and afterwards to resell her." They accordingly purchased and repaired her. The ship, being American built, could not obtain an English registry; and they accordingly determined to have her registered in the United States in the name of one Robertson, a citizen of the United States and a merchant of Charleston, who was a common friend, and to employ her in the American trade until she could be disposed of. While the repairs were in progress plaintiff wrote to Robertson telling him of their purchase and agreement, adding: "the vessel, therefore, according to the registry, will appear to be your property, although belonging to Mr. Taylor and myself." And such was the undisputed agreement. The repairs being completed, the ship was freighted and sent to Charleston,

consigned to Robertson. Before she sailed the plaintiff and Taylor took from the master a bottomry bond for the amount expended by them for repairs, payable within ten days after the safe arrival of the ship at Charleston. Correspondence ensued between the parties, following upon a letter from Robertson, to the effect that, if the ship was to be registered in the United States, it must be Robertson's sole property, and neither plaintiff or Taylor could have a share of it, and he offered to buy the ship. Pending correspondence on this subject, the ship made several voyages between the United States and England, carrying the products of the respective countries, under the direction of Taylor at Liverpool and Robertson at Charleston. The freight money received by Robertson had been paid over by him to Taylor for joint account of plaintiff and Taylor, or had been allowed Taylor in account for the same purpose. The ship was afterwards sold in New York, and a portion, at least, of the price was paid over by Robertson to Taylor, for account of himself and plaintiff. No evidence was given of the United States law respecting the registry of ships, although references to such law were contained in the correspondence. The suit was for an accounting of the freight-money and the proceeds of the ship which had come into the hands of Taylor.

The contentions of Taylor were (1) that the ship-registry acts of the United States made the whole transaction illegal in England; (2) that the ship never was the joint property of plaintiff and defendant Taylor, but belonged to Robertson in whose name it was registered; (3) that the importations were illegal under the English navigation laws. As to the title to the ship, the chancellor held that there was nothing in English law to prevent English subjects being part-owners in an American ship; that if there was any United States law having such an effect, or making the registry in Robertson's name illegal if plaintiff and Taylor were part-owners, that was a *fact* for defendant to plead and prove, and no such proof had been made. (815-6.) And he held that in equity Sharp and Taylor were joint-owners of the ship.

As to the proceeds of the sale the court held that they belonged to Sharp and Taylor as such part-owners. But if Robertson was

to be regarded as sole owner, still, as in that case the bottomry bond would be valid, so that bond made Sharp and Taylor owners of the proceeds of the ship to the amount due on the bond.

As to the freight earnings, to the objection of illegality based on the laws of the United States, the same answer was made, viz: that no proof was made of such laws. The next objection was that the freight was earned illegally, because the English navigation laws prohibit the importation into England, for the purpose of consumption, of any products of foreign countries except in ships of the country of produce or in English ships; that the ship was not English, being of American build and registry; that she was not an American ship if plaintiff and Taylor held an interest in her; and therefore the importations were contrary to the provisions of law and no title can be founded on them. The court says: "This assumes that the plaintiff and Taylor had some interest in the ship, and the plaintiff cannot, I think, in this suit, repudiate such claim." (p. 817). The ship being of American build and registry, was of course *prima facie* an American ship. It does not appear "that an English subject cannot by the law of England have any interest in a foreign ship." The objection that by the United States laws the interest of Sharp and Taylor in the ship would prevent her being an American one, or entitled to registry as such, or would make the registry a fraud on those laws, is not made good for want of proof of the laws of the United States. Consequently there was no illegality in the importations. And the court says on page 818: "The importation of the goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to any one."

It therefore clearly appears, and the court so considered, *first* that there was no illegality in the original agreement between Sharp and Taylor, and nothing which prevented their being lawful part-owners in the ship; *second*, that there was no illegality in the transactions with third persons under the agreement, transactions in which the freight was earned and paid. It also appears that the proceeds of the ship and the freight-earnings, or a part of them, had been paid over by Robertson to Taylor for joint account of himself and Sharp,—that is upon the implied promise by Taylor to pay

over the just share thereof to plaintiff as part-owner. And the court considers that the plaintiff is entitled to a share of the proceeds of the ship and of the freight-money as part-owner of the ship; and that, even if he and Taylor were not part-owners, and the ship belonged solely to Robertson, still, Robertson having paid over the money to Taylor for account of himself and Sharp, Taylor cannot set up that Robertson had acquired, by unlawful practices, the money which he so gave to Taylor for Sharp, and which Taylor had agreed to pay over to Sharp.

Having held that there was no illegality in the importations, the court goes on to hold that, even if there had been, Taylor could not set up such illegality as against the title asserted by plaintiff as part-owner of the ship. The illegality of such importations could be set up as a defence by the shipper in an action for the freight-money; but when the shipper paid the money that transaction was closed, the money was like any other money. The plaintiff, suing as part-owner of the ship, was not asserting any title based on the contracts of affreightment, whether legal or illegal, was not seeking the enforcement of any such contract. The parties had already carried out all provisions of those contracts, the ship-owner by carrying the goods, the shippers or consignees by paying the freight. The title on which the plaintiff claimed a share of this money was not a title based on the contract of affreightment with third persons, but based on his own part-ownership of the ship, on an original lawful partnership, and on the subsequent obligation of Taylor implied in his having received the money from Robertson for account of himself and plaintiff.

In the *dicta* on this subject, (p 818) the chancellor considers the case on these various titles of plaintiff:

1. As part-owner of the ship—"Can one tenant in common dispute the title common to both?"

2. As partner in a lawful partnership, for if the partnership agreement were unlawful, (as it would be if made for the purpose of carrying on an unlawful business,) there could be no partnership and no firm property—"Can one of two partners possess himself of the property of the firm, and be permitted to retain it if he can show that, in realizing it," (*not* in the formation of the partner-

ship,) "some provision in some act of Parliament was violated? Can one of two partners in any import trade defeat the other by showing that there was some irregularity in passing the goods through the custom-house?"

He does not and could not mean that one party to an agreement for partnership for purposes of smuggling could, as partner, and in a suit on the agreement, compel the other to account for the profits of smuggling transactions under the agreement. He is dealing wholly with the case of a lawful partnership which has realized profits from unlawful transactions—the same noted in the second class considered above, and of which the English pawnbroking cases are typical instances.

He had already said (817): "The plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor received the money, and the plaintiff is now only seeking for payment of his share of the realized profit"—and seeking it upon a title founded on a part ownership or partnership entirely lawful.

He then goes on to make a remark, perhaps ambiguous and perhaps, if taken alone, susceptible of the construction that the test of the right of recovery on any illegal agreement is whether the illegal transactions under it are completed and closed—a meaning, however, he could never have intended. He says, (p. 818:) "The answer to this as to the former case will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties."

That he does not mean that upon the completion of the illegal act under an illegal agreement one party to the agreement can sue the other on the agreement for a share of the profits realized, is very clear. Such a case would be where the ship-owner was suing the shipper on the contract of affreightment for compensation for the illegal voyage. In that case the illegal act, viz., the illegal voyage, is completed and closed. There is no illegality in the subsequent payment of the freight. Yet the case of a suit by the ship-owner for the freight is expressly distinguished in the passage above quoted from

page 818, from the case under consideration—and distinguished as a case where the action would not lie. And he goes on to distinguish *Campbell* v. *Innes*, 4 B & A. 426, an action on a policy of insurance on a ship engaged in an illegal voyage, where the illegal voyage was "completed and closed" by the loss of the ship, but the action was defeated because founded on an unlawful contract of insurance.

He then says (p. 818:) "The difference between enforcing illegal contracts and asserting title to money which has arisen under them is distinctly taken in *Tenant* v. *Elliott*, 1 Bos. & Pul. 3, and *Farmer* v. *Russell*, Id. 296, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*, 7 Ves. 473." But to sustain a suit by one party to an illegal contract against another, founded on that contract and asserting a title based solely on that contract, to recover money realized from illegal acts under that contract, is most certainly to enforce the still executory provisions of the illegal contract. And the cases cited are cases where, although the fund in dispute had its origin in illegal transactions, the *plaintiff's title* was founded on a lawful contract subsequent to those transactions.

3. And this shows that besides plaintiff's title as part-owner and under the original lawful partnership agreement, the chancellor was here considering the title based on a contract made after money has been realized from unlawful transactions, and disposing of such money—being the third class of cases before noted.

He is assuming Robertson to be owner, and is considering the title founded on the payment of the freight-money by him to Taylor, for account of Taylor and plaintiff, and he says: "The American owner might assign the freight to anyone. Assuming this to be so, I am of the opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defence to Sharp's claim."

While the case does not involve the question whether one party to an illegal agreement may, *in a suit upon it, and on a title asserted under it*, recover from the other the fruits of unlawful transactions with third persons, the antecedent probability is almost irresistible that Lord Cottenham never meant to answer any such

question in the affirmative. This case was decided in January, 1849. He was familiar with *Thomson* v. *Thomson*, 7 Ves. 470, (which he cites,) and must have been familiar with *Armstrong* v. *Armstrong*, and *Lewis* v. *Armstrong*. Indeed, as master of the rolls, he heard and decided a question as to costs in the latter case. 3 Mylne & K. 69. As Mr. Pepys, he had been successful counsel in a case in which the plaintiff and the two defendants agreed to buy a ship and to register and sail her in the names of defendants only, (contrary to statute,) but the profits to be divided among all; and it was *held* that the agreement was illegal, and a bill for an account of earnings of "completed and closed" illegal voyages was dismissed on demurrer. *Battersby* v. *Smyth*, 3 Madd. 110. (1818.)

He had himself, as chancellor, in 1837, in a suit for accounting and division of profits of an unlawful business carried on under an illegal agreement for partnership, thus expressed himself:

"It is clear therefore that this contract of partnership was formed for the unlawful purpose of representing at the Surrey theatre prohibited performances. * * * Can this court, under such circumstances, decree to one of the parties to this contract the specific performance of the agreement or any relief growing out of it? *To do so would be inconsistent with all principle, and contrary to all the decided cases*," many of which he reviews.

Ewing v. *Osbaldiston*, 2 Myl. & Cr. 53, 85. (1837.)

He must have been familiar with the decision of *Gordon* v. *Howden*, 12 Cl. & Fin. 237, in the House of Lords, of which court he was a member.

Is it within the limits of belief that he could have intended to overrule all these cases—cases that were in the strictest sense binding on him as authorities—and this without mentioning one of them except *Thomson* v. *Thomson*, while citing that one as authority in support of his reasoning?

The case of *Thomson* v. *Thomson*, 7 Ves. 470, cited by Lord Cottenham, and the fact that he cited it, show that he could not have supposed that he was entertaining a suit by one party to an illegal partnership agreement, *founded solely on that agreement*, for a share of the property acquired by the parties, in execution of the agreement, by means of completed illegal transactions

In that case G agreed to sell to W the command of an East India ship, in consideration of an annuity of £200, to be paid to G by W so long as he should retain command, and on his retirement the annuity to be commuted for a gross sum, to be fixed by disinterested persons. This agreement was against public policy, and was illegal but was carried out by the transfer of the command and the payment of the annuity until W. resigned. On his resignation, under the rules of the East India Co., the sum of £2,040 was paid by the company to W's agent. G filed his bill to reach this money. The bill was dismissed, Sir Wm. Grant saying, in words strikingly applicable to the case of this plaintiff:

"You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. If the case could have been brought to this, that the company had paid this into the hands of a third person to the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust. *Tenant* v. *Elliott* is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then, how are you going to get at it except through this agreement? * * * *Here you cannot stir a step but through that illegal agreement*, and it is impossible for the court to enforce it."

And note that "the transaction alleged to be illegal"—the sale of the command—had long been "closed." And, moreover, the money was not acquired by illegal transactions under the agreement. It was unlawful for W to buy the command of his ship, but it was not unlawful for him, having bought it, to command her faithfully and earn his retiring allowance.

This case of Thomson v. *Thomson, shows that it is entirely immaterial whether money which is the subject of a contract, or is sought to be brought under the operation of a contract, was acquired by right or by wrong, the one vital question being, Is the agreement by which plaintiff claims the money legal or illegal?*

The other cases cited in *Sharp* v. *Taylor* are also cited in *Brooks* v. *Martin* and in *Planters' Bank* v. *Union Bank*, and will (with

others) be more conveniently discussed in connection with those cases.

And our position that Lord Cottenham never meant to assert the doctrine for which plaintiff contends is further sustained by a consideration of the arguments he uses. According to plaintiff's construction of the opinion, his lordship's reasoning is not what we should expect from a judge of such high repute. Let us examine it, as interpreted by plaintiff.

The conclusion reached, according to plaintiff, is that an agreement, illegal when made, because providing for or tending toward the commission of unlawful acts, and, therefore, in its inception utterly void, will, if carried out by the commission of those unlawful acts, and the acquisition thereby of money by one of the parties, become so far valid as that it will give to the other party the same right to a share of the money that he would have had if the agreement had been a legal one in the first instance.

This is sufficiently startling. But why limit the vivifying effect of wrongdoing to successful illegality? Why should unlawful acts which result in profits be more efficacious in legalizing an illegal contract than the same acts when resulting in losses? Yet we believe that no suit has as yet been sustained by one party to such an agreement against another for contribution for losses in doing illegal acts under the agreement. This court, in *Bartle* v. *Coleman*, 4 Pet. 184, emphatically denied any legalizing efficacy to unprosperous wrongdoing.

And why should it be limited to cases of partnership or a joint enterprise? Why should not the successful completion of the illegal transactions by an agent entitle him to his reward? And why should his principal retain the fruits of the employment, and refuse to compensate the agent for his services? Supposing the agent is to be paid out of the profits. Suppose that in *Tool Co.* v. *Norris*, (2 Wall. 45,) the agent was to get nothing unless the company made a profit out of its government contract, nor until the contract was completed and the supplies all delivered and paid for, and was then to receive a percentage of the profits. Here the two conditions requisite to validate an illegal agreement have

been complied with. The illegal transactions to accomplish which the agreement was made have been completed and closed. They will not be affected by anything the court can do in a suit between the agent and principal. The government has made no complaint, and the illegal transactions have been fruitful of profits. Why should the company be allowed to retain them all to itself, and defeat the claim of the agent for his share of them, fully earned by his (to it) faithful, and certainly valuable and indispensable services—on the plea that in the transactions connected with the obtaining of the contract, or in the making of the original agreement of hiring, some rule of public policy has been violated?

Or take the case of an actor in an unlicensed theatre, knowing it to be unlicensed, and therefore illegal. He cannot recover wages at a fixed price, (*Roys* v. *Johnson*, 7 Gray, 162,) for services "completed and closed." But if he is to be paid a share of the profits instead of or in addition to a fixed sum, this share he may recover. Is not this a fair application of Lord Cottenham's reasoning as construed by plaintiff? And is there any ground on which a division can be had between partners which is not equally applicable as between principal and agent? But can there be the slightest doubt but that in case of such a suit by an agent, this court and every court would, in spite of such reasoning, deny any such efficacy to successful wrongdoing?

The fundamental error lies in the assumption that an agreement originally illegal because against public policy can be made legal by any action of the parties. But the further assumption that it becomes legal, and the courts will entertain suits to enforce rights under it, upon, but not until, the completion (if profitable) of the illegal acts under it, *and because of such completion*, is, if possible, yet more erroneous.

It is supposed to be well settled that the purpose of the rule of policy avoiding *ab initio* agreements because of their tendency, is to prevent the commission of the unlawful acts to which they tend. But in cases where the rule has been ineffectual to prevent the making of the agreement, the law aims to prevent it from being carried out by giving the parties a *locus pœnitentiæ*,—an opportunity to withdraw from it. And to this end either may, before the

illegal acts are done, maintain a suit to recover whatever money or property he has delivered to the other under it. But this is the only suit involving such agreement that the law, as heretofore interpreted, permits either party to bring against the other, and this must be ~~done~~ brought before the doing of the unlawful acts, and is allowed to be brought only because *in disaffirmance* of the unlawful agreement.

The old rule was not, the new rule ought not to be, difficult of application. But an attempt to apply both rules to a given case might work strange results. Let us imagine a case brought before Lord Cottenham, for, as the supposed author of the new rule, he would be best qualified to administer it. Three men, A B, and C, have made an illegal agreement to commit a series of frauds. Each has contributed funds to the common enterprise, which has been successfully launched and promises abundant returns. The money has been placed in C's hands, several fraudulent transactions have been entered upon, but no one of them has been completed, though some profits are supposed to have been realized. C ousts his partners from the management of the business, assumes entire control of the funds, and refuses to the others any information. A, faint-hearted, and perhaps conscience-stricken, wishes to retire. B, of sterner stuff, wishes to bring C to terms. A files his bill to rescind, and to recover his investment. B files his bill—or his cross-bill—to establish his rights as a partner, and to compel an account. The cases come on together on demurrers by C.

His lordship must have said to both plaintiffs: "This contract of partnership was formed for unlawful purposes. Can this court, under such circumstances, decree to one of the parties any relief growing out of it? To do so would be inconsistent with all principle and all the decided cases. I so held in *Ewing* v. *Osbaldiston*, 2 Mylne & Cr. 53. To be sure, A desires to rescind and withdraw his contribution, but his bill shows that the enterprise has been launched. The time for repentance is passed, and his bill is filed too late. As to B's bill, the case shows that the partnership is formed for purposes of fraud, and that, though several promising frauds are *in fieri*, not one fraudulent transaction has been completed and closed, and the case is therefore not within *Sharp* v. *Taylor*. His

bill is premature. Let both bills be dismissed, without prejudice to the filing of a new bill by either plaintiff, when the fraudulent transactions shall have been completed and closed, for a full account and a division of the profits."

Would any one have been readier than Lord Cottenham to repudiate any interpretation of his opinion in *Sharp* v. *Taylor* which could lead to such a result as this? But we submit that the construction put upon it by plaintiff's counsel—and no other construction can make it of any avail to them whatever—does necessarily and inevitably lead to such results. And while the results show that the case has been misconstrued, they show also that, if not misconstrued,—if it means what the plaintiff's counsel have claimed it to mean.—it would have been long since overruled as "inconsistent with all principle, and contrary to all the decided cases."

Sharp v. *Taylor* was reviewed and searchingly criticised by Jessel, M. R. in *Sykes* v. *Beadon*, 11 Ch. Div. 70, 194-7.

VI.

The Case of Brooks v. Martin.

Brooks v. *Martin*, 2 Wall. 70, next claims attention. This case was decided principally on the authority of *Sharp* v. *Taylor*, the court saying (p. 81) that "the principle is the same in both cases, and the analogy in the facts is so close that any rule which should govern the one ought also to control the other." The court adopts the reasoning of Lord Cottenham which we have quoted, supplementing it with similar arguments.

The circumstance that *Sharp* v. *Taylor* was thus accepted as authority is an additional and controlling reason that the construction put on that case by plaintiff's counsel is not correct, for this court would never have accepted as authoritative a case which, on that construction, is in conflict with every preceding and following case, and is vicious in its reasoning and in its tendency.

It is true that the construction against which we contend has not unfrequently been put upon *Brooks* v. *Martin*, but not, as we ex-

pect to show, by this court, notwithstanding *Planters' Bank* v. *Union Bank*. And this construction has made the case a stumbling-block, has led to its being silently disregarded by some courts, criticised, or distinguished and explained away by others, and blindly followed in a few cases.

Upon the facts stated, the plaintiff might well have been entitled to recover, even if the original partnership had been formed for the purchase of soldiers' claims, and had been on that account illegal. The assignments of those claims before warrant issued, being absolutely void, of course passed no title. So long as the parties held merely such assignments, they would, to that extent, hold no property. But the act did not prohibit the soldiers from assigning their land-warrants after issuance. Such assignments would be entirely valid. And they would not be the less valid although, before their issuance, the soldier had made a void—or even an illegal—agreement to assign them. If the assignments of the warrants were made to both Brooks and Martin jointly, the title of each of them would rest, *not* on the previous illegal agreement of the soldier to assign, but on the perfectly legal assignment of the warrant. If they wished to assert their title against a third person, or if either of them sought to assert a title against the other, that title could not be impaired by proof of a previous illegal contract which, being absolutely void, could neither confer or take away rights.

The report is defective in that while it states (p. 74) that where the claims were purchased "prior to the date of the warrant granted, assignments were subsequently made by the soldier," it is entirely silent as to the names of the assignees in such assignments. If they were assigned to Brooks, Martin and Field in their individual names, (and they might well have been,) the title of Brooks, resting on such assignment, would be perfectly valid, whatever illegal partnership he and the others had previously attempted to form, whatever illegalities they might have committed. And if thereafter Brooks cheated Martin out of his interest as such assignee, whether his interest in the warrants or the proceeds, he would be entitled to sue for relief, and it would not be open to Brooks to set up the original illegal partnership, which was not the source of Brooks'

title, and on which he did not found his claim to an accounting and payment.

Of course, in such a suit it would make no difference what was the state of the accounts between the parties under the original illegal agreement, when the title to the warrants thus vested in them. In law they had no accounts, and moreover their title rests and must rest on the warrants and on those alone. And as owners in common they are entitled to their shares of the common property, irrespective of any supposed demands that one may have against another founded on any utterly void agreement.

There is, then, nothing in the facts of the case of *Brooks* v. *Martin*, as reported, which precludes a suit for an accounting and division, based on the title and to be had on the principles thus indicated.

Another theory of the facts in *Brooks* v. *Martin*—a theory which the report goes far to bear out, if not completely establish—is that the case was regarded by the court as a suit for an accounting and division, between partners in a lawful contract of partnership, of the profits of an unlawful business carried on by the partnership. Thus viewed, the case is clearly in line with the English pawnbroker cases.

The report states that the parties entered into articles of partnership for "the purchase and sale of bounty land-warrants that have been or may be issued under the law of congress." True, the reporter says that this was "the *ostensible* object of the firm," but our present concern is with the view taken of it by the court. And it is true that it was competent to show a collateral agreement or purpose of the parties, *when making the partnership agreement*, that its business should be the illegal one of buying soldiers' claims, and if such were shown, the partnership agreement would be illegal and void. But it is also true that such illegal purpose is not to be presumed, but should be fairly made out by evidence. The report states (p. 75) that the defendant pleaded that the statements of the articles of partnership "did not show the true purpose of its formation, nor the business which it really transacted; but that the partners intended and really did engage in buying up the *claims* of the soldiers * * * long before any scrip or land-warrants were

issued by the government (a fact of which,"—says the reporter,—"there appeared by the evidence to be no great doubt) that this was an illegal traffic forbidden by the act of congress * * * and against public policy; that, accordingly, the plaintiff could have no relief." This statement is open to the same objection; (that it is equivocal) that was made to the exception in *Fraser* v. *Hill*, 1 Macqueen, 392. Two facts are pleaded in the answer: (1) that the agreement for a partnership was made for an unlawful purpose, and (2) that the business actually transacted was illegal, "a fact of which there was no great doubt." But which of the two facts was thus established? Grammatically, the words "a fact" should refer to the last of the facts stated, viz., that the business was illegally transacted, in which case the reporter's statement contains nothing to show that the partnership was illegal in its inception, nothing to show that the illegal collateral purpose or agreement was not subsequent to and distinct from the partnership. And as the written agreement should be deemed to express the purpose of the parties till the contrary is shown, and as illegality is not to be presumed, and as the mere mode of carrying out a lawful contract "would not have been sufficient to make the contract itself illegal—no, not though the illegality were ever so soon after the date of the contract," (*Fraser* v. *Hill*, 1 Macq. 392-3,) we say that on the reporter's statement of the facts, the case is a case of a legal partnership doing an illegal business, and not a case of a partnership agreement illegal in its inception, and hence void *ab initio*.

In the argument for defendant, it was insisted that the original agreement was illegal, but that does not show that it was proved to be so, or was so regarded by the court.

We come now to the opinion. Bearing in mind that the inefficacy of an illegal agreement to confer any rights as between parties to it *in pari delicto*, is among the axioms of the law; that according to all preceding cases, if the original agreement were illegal, the suit, so far as it sought an accounting and division—and this was the gist of it—would not lie; and that no man better understood the use of language or could express himself more clearly or more forcibly than Mr. Justice Miller, we should certainly expect that if

he considered the partnership agreement illegal, and yet meant to hold that, notwithstanding such illegality, a suit for account of profits under it would lie between the parties to it, he would have stated both these conclusions in terms incapable of misconstruction.

The opinion seems to have been delivered *orally* and not to be reported *verbatim*.

"Mr. Justice Miller, stating the facts of the case as he proceeded, and showing that its different parts were proved by the testimony, delivered the opinion of the court *to the following effect*.

"We think that in point of fact the allegation of the answer *that the traffic in which this firm engaged* was the buying up of soldiers' claims * * * is true. We have as little doubt that *the traffic* was illegal." Now, as has been seen, the answer contains *two* allegations: (1) that the partnership was formed to deal in soldiers' claims, (2) that the partners did engage in the business of dealing in soldiers' claims. *The last allegation only is found by the court to be true.* The court does not find that the first allegation was true; and if the court thought that this was a suit for profits arrising under an agreement for partnership illegal in its inception, the fact thus found would have been plainly stated.

Again, "the traffic in which *this firm* engaged"—that is, the business done by this lawful partnership; for if the agreement for partnership was illegal, there was no "firm."

It is true the court says: "If Brooks, after the signing of these articles of partnership, had said to Martin: 'I refuse to proceed with this partnership because the purpose of it is illegal,' Martin would have been entirely without remedy." But this view of the purpose of the partnership, as it is imputed to Martin, cannot fairly be twisted into a declaration or even an intimation that the court deemed the purpose of the partnership *in its inception* illegal. "After the signing of these articles," needs not to mean immediately after, but rather at such subsequent time as the firm determined to deal in claims, but before they had done so. A partner in a lawful partnership might naturally refuse to engage in an illegal traffic, but it would not be natural for one who, with an illegal purpose, has signed an illegal agreement, at once to refuse to go on with it because of such illegal purpose. And besides, no partner

in any partnership can have any remedy against another who, before the business is begun or while it is in progress, totally refuses to go on with the partnership—that is, withdraws from it, provided no time were limited for its duration. But if a partner in a lawful firm refuses, while remaining in it, to take part in a business within the scope of the partnership agreement, even if not contemplated when the agreement was made, his partners, if damaged by the refusal, would have a remedy, provided such business were lawful, but not if it were unlawful.

Hence the illustration used is that of a partner in a legal partnership refusing to enter on a business not contemplated in its formation, and refusing because such business is unlawful.

And in any case, a mere illustration used by the court in delivering what seems to be an oral opinion is entitled to much less weight than the other matters we have pointed out.

Again: "When the bill in the present case was filed all the claims of the soldiers *thus illegally purchased by the partnership*"—*not*, thus purchased *by the illegal partnership*—"had been converted into land-warrants, and all the warrants had been sold and located. The original defect *in the purchase*"—*not*, in the *partnership*—"had, in many cases, been cured by the assignment of the warrant by the soldier after its issue." This shows that the question considered was *not* whether there was a partnership, but whether that partnership had property that could be divided. The assignment of soldiers' claims was a nullity, and, as the court holds, illegal. No court could treat the assigned claims as property, and decree a division, even among members of a lawful firm, nor entertain a suit where such firm owed nothing and had no other property.

And the court goes on to speak of the results of the "*partnership* business," and asks: "Does it lie in the mouth of *the partner* who has, by fraudulent means, obtained possession and control of all those funds, to refuse to do equity because of the wrong originally done or intended to the soldier?" Here, too, the court bases its reasoning on the assumption of a lawful partnership, and the duties of partners to each other arising out of such lawful contract, (and none such can spring from an illegal contract,) and meets an objec-

tion based, not on the illegality in the formation, but on the illegality of the business, of the partnership, as that in originally buying the claims, (not in originally forming the partnership,) some wrong was done or intended to the soldier. And so the purpose of the statute will be best served by "requiring him to execute justice between himself and *his partner*."

And the court asks: "What rule of public morals will be weakened by compelling him to do so? * * * The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

Here, too, it is evident the court has in mind illegal transactions of a lawful partnership with third persons. Those transactions *are* "accomplished facts." They "cannot be affected by any action of the court in this case." But if the original agreement for partnership was illegal, the complete carrying out of *that* transaction remains to be effected. It is not an "accomplished fact," and will be very seriously affected by the action of the court, according as the court recognizes its validity and enforces it by according to plaintiff the rights claimed under it, or denies the existence of any such rights. The rule of public morals which avoids illegal agreements does not and cannot extend to attaching any stigma to the money or property which is the subject-matter or the fruits of them, and is not violated if that money or property is brought under the operation of a subsisting lawful contract, or becomes the subject-matter or enters into the consideration of a subsequent lawful contract. But to say that in a particular case a court will recognize and give effect to rights claimed by one party to an illegal agreement against another, and resting solely on the executory provisions of such agreement, merely because the unlawful acts to which that agreement tended have been done and cannot be undone, is to assume that the purpose of the rule of public policy is to redress the particular wrong done to others in the special case in which it is invoked, not to prevent similar wrongs in other cases. Refusing or granting the relief asked in *Bartle* v. *Coleman*, or *Wheeler* v. *Sage*, or *Tool Co.* v. *Norris*, could not undo any wrong done to third persons. But refusing a recovery in those cases and all cases of illegal agreements is believed to have a tendency to prevent in

the future the making of such agreements and the evils to which they tend. And for this reason, and this reason only, the law makes an illegal consideration insufficient to support a contract, makes an agreement on such consideration or with an unlawful purpose utterly void in its very inception and at all times as between the parties to it. Hence the remarks of the court would be irrelevant and ill-founded, if the suit were regarded as founded on an agreement for partnership illegal and void *ab initio*.

The residue of the opinion in *Brooks* v. *Martin*, so far as bearing on the present question, consists of a statement of the case in *Sharp* v. *Taylor*, a statement that the cases are alike in principle and closely analogous in their facts, (which, of itself, is fatal to any assumption that the court regarded the original agreement for partnership as illegal,) and a quotation of the reasoning which Lord Cottenham, in that case, based on the fact that the illegal transactions have been completed and closed. This reasoning we have discussed sufficiently in considering that case.

It is a noticeable fact that no mention is made, by counsel or the court, of the very leading case of *Armstrong* v. *Toler*, 11 Wheat. 258, in which the law in regard to illegal agreements and to subsequent valid contracts relating to the subject-matter of illegal agreements received a lucid exposition from Chief Justice Marshall. Had the court in *Brooks* v. *Martin* deemed that the suit was founded on an agreement for partnership illegal and void in its inception, they would hardly have lett out of sight a case so important, especially if intending substantially to overrule it.

We submit, then, that the case of *Brooks* v. *Martin* was and was understood by the court to be the case of a lawful partnership engaged in an illegal business, the fruits of which were sought to be brought under the operation of the previously-made and entirely lawful contract of partnership. And, being such a case, it is in full accord with principle and the authorities, but lends no aid to the contention of the plaintiff in this case.

Before proceeding to consider *Planters' Bank* v. *Union Bank*, it may be not amiss to note the reception which *Brooks* v. *Martin* has received in several of the leading state courts.

In *Snell* v. *Dwight*, 120 Mass. 9, and *Dunham* v. *Presby*, Id. 285, (1876,) the court, in a suit by one party to an illegal partnership agreement against the other, for an account of resulting profits, refused any relief, thus denying the doctrine imputed by plaintiff's counsel to *Brooks* v. *Martin*. On page 17, the court thinks that *Brooks* v. *Martin* and *Sharp* v. *Taylor*, "relate to subsequent or collateral contracts or transactions, in which the original illegal acts and contracts are held to form no part of the consideration." (And this court in *Dent* v. *Ferguson*, 132 U. S. 50, 66-7, seems to place the cases on this ground.) On pages 18 and 19, however, the court evidently finds great difficulty in explaining the case, and attaches some importance to the fact that the suit was brought to set aside the sale from *Martin* to *Brooks*, and not on the original agreement. True as to the sale, but after the sale was set aside, Martin could have an accounting of partnership property only by virtue of some valid contract of partnership on which his very *status* as partner must depend, or on some new agreement, independent of the original illegal partnership, and on a new and lawful consideration.

In *Woodworth* v. *Bennett*, 43 N. Y. 273, (1870,) Church, C. J., considers that *Brooks* v. *Martin* is a case where a lawful firm has received funds from an illegal business, and that in such a case "it may be that a division will be enforced by virtue of the rights of the members under the contract of partnership. This is the utmost limit to which the rule can be carried." In the case before the court relief on an illegal partnership agreement in respect of profits of completed illegal transactions, was refused because of the illegality in the original agreement.

In *Watson* v. *Murray*, 23 N. J. Eq. 257, (1872,) and in *Todd* v. *Rafferty*, 30 N. J. Eq. 254, (1878,) the case of *Brooks* v. *Martin* was considered in the court of chancery, and in *Wilson* v. *Gregory*, 36 N. J. Law, 315, (1873,) it was considered by the supreme court of New Jersey.

In the first case (a suit for accounting of a lottery partnership, legal in the state where formed,) the court says (p. 262) of *Sharp* v. *Taylor*, that "the partners did not enter into partnership to carry

on an illegal business, nor, so far as appears, to violate the law in the prosecution of a legal one. Some part of the partnership gains appeared to have resulted from a breach of positive law. The court directed an account of the whole." *Brooks* v. *Martin* is treated as merely a case where "the business of the firm related to * * a traffic which the act of congress prohibited," and is further distinguished by the fact that the traffic was merely illegal, and not criminal. *Watson* v. *Murray* is cited as authority in *Oscanyan* v. *Arms Co.*, 103 U. S. 277.

In *Todd* v. *Rafferty*, the same court refused to compel the executors of a deceased partner in a lawful firm to account to the survivor for profits of an illegal business secretly carried on by their testator, and for which, if resulting from a lawful business, an account would have been decreed. In this case the vice-chancellor (pp. 259, 260) repudiates *Brooks* v. *Martin* together with a mass of other cases, some of doubtful, others of unquestionable soundness, and seems to fall into the opposite error of refusing an account where it should have been decreed.

In *Wilson* v. *Gregory*, Beasley, C. J., correctly interprets *Sharp* v. *Taylor*, and *Brooks* v. *Martin* as holding that a partner in a lawful firm may enforce an accounting of profits from an illegal business, and considers that Lord Cottenham pushed the doctrine further than previous cases would warrant, (his attention was not called to the English pawnbroker cases,) and he considers that Lord Cottenham's views were "signally enforced, if not considerably transcended, in *Brooks* v. *Martin*." This doctrine is energetically criticised, although the learned judge fails to distinguish between an unexecuted illegal agreement, the executory provisions of which the court is asked to enforce, and the completed illegal transactions under such agreement, the fruits of which are in the hands of one of the parties to it.

In *Craft* v. *McConoughy*, 79 Ill. 346, (1875,) a party to an illegal agreement for partnership in controlling the grain trade sued for an account of profits. "It was insisted," the court say, "that even if the contract was contrary to public policy, as it has been executed, a court of equity will require an account. The rule is, however, well settled in this state that a court of equity will not

lend its aid in the division of the profits of an illegal transaction between associates." And see *Skeels* v. *Phillips*, 54 Ill. 309; *Tobey* v. *Robinson*, 99 Ill. 222, 232.

In *Lucas* v. *Allen*, 80 Ky. 681, (1883,) *Brooks* v. *Martin* was cited, and an extract from the opinion of the court as to the doctrine imputed to that case is printed *supra*, p. 294.

King v. *Winants*, 71 N. C. 469, (1874,) was also a suit between parties *in pari delicto* for account of profits under an illegal agreement for partnership.

The court well says: "Suppose in the case before us the parties had come to a settlement, and the defendant had given to the plaintiff his note for the amount due, could the plaintiff have recovered on the note? *Blythe* v. *Lovingood*, 2 Ired. 20, is express authority that he could not." *Brooks* v. *Martin* was cited, and, after stating it, and considering that the suit was not for an accounting under an original illegal partnership agreement, (a construction which, however, is not made very clear,) the court say:

"It is plain that in that case there could have been an account and settlement without any reference whatever to the original illegal transaction, and the decision is put on that ground. Any other interpretation puts it off by itself. But in our case it is the very illegal contract itself between the parties which we are called upon to examine into, settle up and enforce. * * * Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveller, the other rifles his pocket of $1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy, and the rencounter, and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now if these robbers had taken this $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money That would have been a past transaction not necessary to be mentioned in the settlement of the new business. And this illustrates *Brooks* v. *Martin*, so relied on by the plaintiff."

One judge, however, dissented, on the authority of *Brooks* v. *Martin*, which he though could not be distinguished—as it could not, if it has the meaning against which we contend.

In *Texas & Pac. R'y Co.* v. *Southern Pac. R'y Co.*, 41 La. An. 970, *Brooks* v. *Martin*, was construed as not authorizing one railway company to recover from another its share of the profits of an unlawful agreement, and this construction was approved in *Emery* v. *Ohio Candle Co.*, 47 Ohio St. 320.

Doubtless, a further examination would discover many more cases where *Brooks* v. *Martin* has been considered, and where, while its true meaning has not always been brought to light, the doctrine imputed to it by plaintiff has been denied to be law. We insist that the case, *as reported*, declared no such doctrine. But even if such construction of its language be possible, even if the spoken words, perhaps unguarded, perhaps inexactly reported, will bear the meaning imputed to them, then to that extent they misrepresent the determination of the court and the views of the judge who was its spokesman; for it cannot be that the court meant to depart so widely from the ancient way as to lay down a doctrine pronounced by the very judge on whom they rely as an authority for it, to be "inconsistent with all principle and contrary to all the decided cases." Our criticism of its reasoning, on such a construction of it, we have given in our comments on *Sharp* v. *Taylor*. That reasoning would make it impossible for the circuit court to refuse to entertain such a bill as that in *Everet* v. *Williams*, for an accounting between a partnership of highwaymen. Should at any time the temptation of the enormous profits to be made by wrecking a railway in his charge overpower the virtue of a federal or state judge, and result in a secret partnership between him and his receiver, and the enterprise should succeed, and the judge's share of the profit be in the receiver's hands, and the judge should sue for an accounting and division, on the authority of *Brooks* v. *Martin*, the doctrine imputed to that case would clearly sustain his suit, and no answer could be made to it—at least, by any circuit court of the United States. A decision which necessarily involves such results could not have been made in the first instance, and certainly could not have passed for nearly thirty years unquestioned by the court in which it was pronounced—a court which, so late as 1889, declared by its chief-justice that "the rule of law is of universal application that none shall, by the aid of a court of justice,

obtain the fruits of an unlawful bargain." *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412.

VII.

The Case of Planters' Bank v. Union Bank.

A single other decision of this court, *Planters' Bank* v. *Union Bank*, 16 Wall. 483, following *Brooks* v. *Martin*, remains to be considered.

This case, also, rightly understood, is in entire harmony with our position that while money which is the fruit of illegal transactions under an illegal contract may come under the operation of a prior lawful contract between the parties to the illegal agreement, or may be the subject matter or may enter into the consideration of subsequent lawful contracts between the parties to the illegal agreement (or either of them) and third persons, or with each other, it does not follow from this, nor is it the law, that a party to an illegal agreement can, *in an action on the illegal agreement*, recover from the other the fruits of unlawful transactions under the agreement.

The facts in the case were these:

During the rebellion, the Union Bank of New Orleans was the correspondent of the Planters' Bank of Natchez, apparently under a contract of general agency, such as subsists between banks in smaller towns or cities and their correspondents in the large financial centres, and embracing within its scope the collection and sale of notes, drafts, bonds, coupons and other securities transmitted by the principal to the agent for sale or collection, and the crediting and remitting of the proceeds in general account, or, if specially directed, remitting the proceeds of any particular transaction when completed. In this state of the relations between the banks, a large balance accumulated in favor of the Planters', and stood to its credit on the books of the Union, and in the account rendered by the latter to the former. This balance was made up of proceeds of collections and sales of securities, and, *inter alia*, of the proceeds of the sales of confederate bonds. One question in the case

was upon the liability of the Union bank to account for the proceeds of the sales of these bonds.

It was held that, the action not being to enforce an illegal contract, but merely to recover the proceeds of illegal transactions, the plaintiff, not requiring the aid of any illegal transaction, should recover. The court say: "It is enough that the defendants have in hand a thing of value belonging to them," (plaintiff.) "Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been accomplished, the money or price of it may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin."—that is, the origin of the money, not of the promise.

Here it is clear that the court disclaimed any right of a party to an illegal agreement to recover the fruits of it from the other, in an action *on the agreement itself*. Such right of recovery must be founded on some collateral contract, (in itself free from illegality,) of which the fruit of the illegal agreement may form the subject-matter or may *enter into* the consideration. And hence, the opinion is a correct exposition of the law, and in accordance with the position we have all along maintained.

But the case is cited against us as authority for the position that when one person assumes to appoint another as his agent to do an illegal act, the money acquired by that act, in the agent's hands, may be recovered by the assumed principal,—as where two parties make an agreement that one shall receive lottery tickets, or counterfeit money, to sell for the other and account for the proceeds, or munitions of war to be sold to the public enemy.

As agency is a contract, and the rights and duties of the parties to each other rest on the contract, and as a contract to do a thing which the law forbids to be done is itself illegal, it is the first condition of a contract of agency, the indispensable prerequisite to the existence of the relation of principal and agent, that the contract shall be lawful,—that the contract shall not be upon an illegal consideration or for an unlawful purpose. If the thing agreed to be done by the assumed agent—the purpose for which he is appointed

agent—is illegal, then the agreement is utterly void, and no agency is constituted. *U. S.* v. *Grossmayer*, 9 Wall. 72.

Now, in the case of munitions of war to be sold to the public enemy, certainly after the assumed agent had entered on the business of selling them, and had either made advances on them, or incurred expense in the business, and the goods had been captured or lost, he could not recover from his employer his expenses or advances, on any previous promise implied or expressed; for the consideration of any such promise, being illegal, would not support an express promise, nor, for the same reason, could any be implied. In a case of an illegality much less obnoxious—an agency to gamble in grain—this court so held, in *Irwin* v. *Williar*, 110 U. S. 499, 510. And this must be on the ground that there was no contract of agency; for, if there were, and the advances were made or expenses incurred in acts within the scope of it, a promise of repayment would be implied, even if none were expressed in the contract.

But if the assumed agent could not recover from his employer if the adventure failed, on what ground can the employer recover the proceeds from the assumed agent, if it succeeds? Is the employer's claim for the proceeds of goods sold more meritorious than that of the assumed agent for services and advances? Or does the legality of a contract depend on the prosperous issue of the dealings in execution of it?

The employer's claim must rest on one of two grounds, viz.: (1) His right under the contract, or (2) His right as owner of the property sold.

But if the agency is for an unlawful purpose, he can assert no contract rights, for there is no contract. There is no contract when the enterprise fails and the agent sues—nor indeed would there be any if the enterprise succeeded, and the assumed agent, not having received the proceeds, sued the employer for services or advances. *Tool Co.* v. *Norris*, 2 Wall. 45; *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396.

Can he recover as owner of the property sold? This assumes that his title to the proceeds is an incident of his title to the prop-

erty, and of course his right to recover the property can be no greater than would be his right to recover the property if not sold.

But the only suit in which he could reclaim the goods would be a suit brought *before the illegal purpose was carried out.* *Taylor* v. *Bowers*, 1 Q. B. Div. 291, 295, 300; *Thomas* v. *City of Richmond*, 12 Wall. 349; *Spring Co.* v. *Knowlton*, 103 U. S. 49. Certainly, if the munitions had been delivered under an illegal agreement of sale between citizens of the United States, for the purpose of being furnished to its enemies, the seller, as he could not have recovered the price, so he could not have recovered the goods themselves from the buyer, nor any proceeds in that buyer's hands received on a sale to the enemy. *Thomas* v. *City of Richmond*, 12 Wall. 349, 355; *Hanauer* v. *Doane*, Id. 342.

And where the thing delivered under, and which is the subject of, the illegal agreement of agency for sale, is not a thing capable of lawful use, but such a thing as lottery tickets or counterfeit paper money, the argument based on the original ownership of the employer wholly fails. The law which aims to discourage lotteries and counterfeiting, does not stultify itself so far as to recognize those things as "property" which can become the subject of rights as between individuals, (though lottery tickets may, perhaps, be the subject of larceny, lest in aiming to discourage gambling the law should encourage thieving,) nor does it concede to them any value. No court would entertain an action of replevin or trover for lottery tickets (where lotteries are illegal) or for counterfeit money. "Such property is, so to speak, outlawed." *Spalding* v. *Preston*, 21 Vt. 9, 15.

And where one person employs another to make and utter counterfeit money, furnishing him with materials and implements for its manufacture, it is not easy to see in what respect the former would stand on any different footing in a court of justice, whether his suit were to recover the tools, or the unused material, or the unissued counterfeits, or the proceeds of counterfeits issued, or for the conversion of the tools or materials or counterfeits.

And so it is held that one person who has, under an illegal agreement for agency, delivered lottery tickets to another for sale,

cannot recover from him unsold tickets or the proceeds of tickets sold, in any suit resting on his ownership of the tickets or on any right arising from the agreement, the delivery, or the sale and receipt of proceeds. *Lemon* v. *Grosskopf*, 22 Wis. 447. And the same rule is declared in case of an illegal agency for sale of intoxicating liquors. *King* v. *McEvoy*, 4 Allen, 110; *Galligan* v. *Fannan*, 7 Allen, 255.

And so in *Fales* v. *Mayberry*, 2 Gall. 560, a suit against the master of a slave-ship, by the owners, for the proceeds of the cargo in his hands, Story, J., was clear that the suit would not lie. This case is directly opposed to the doctrine imputed to *Brooks* v. *Martin*, inasmuch as Story, J., while holding that, if a case of agency, (as claimed by plaintiff,) the suit would not lie, held it to be really a case of "partnership in an illegal transaction," and that "nothing is better settled than that, as between partners, no action can be sustained on a contract in violation of the laws."

If, then, the case of *Planters' Bank* v. *Union Bank*, were a case of a single and isolated transaction, a case where, no previous contract of agency subsisting between them, A employs B to sell confederate bonds, then delivered to him, and account for the proceeds, it is very clear that A could recover from B neither bonds unsold, nor the proceeds of bonds sold, in any suit resting on A's previous ownership of the bonds, or on any rights or obligations created by the agreement for agency. This must be so, since the bonds were issued in aid of what the courts of the United States have always held and must hold to have been a conspiracy to overthrow the government. *Carlisle* v. *United States*, 16 Wall. 147. They could not be lawfully dealt in. Any sale of them was illegal, because giving them currency and credit, and thus directly aiding the enemies of the United States. *Hanauer* v. *Woodruff*, 15 Wall. 439. Nor could they be regarded as property in which the holder could have any rights, or which could be the subject-matter of any contract. Suppose that, during the rebellion, an action of replevin for such bonds had been brought between citizens of loyal states in any court of the United States. It would seem that the court must have refused to entertain it, for no greater aid could have been given to the rebellion than a recognition of such bonds

as "property" by the courts of the United States. A thing cannot be property in the sight of the law which is incapable of lawful use or lawful sale.

And because they could not be regarded as property, because they were incapable of being the subjects of lawful traffic, an agreement for an agency to sell them would have been an unlawful agreement, and no obligation whatever would have been imposed on the assumed agent either to return unsold bonds on request, or to account for the proceeds of bonds sold; nor could the employer have recovered either bonds or proceeds in any suit founded on the illegal agreement for agency, or on a claim of ownership of the bonds themselves.

If, then, the transaction between the two banks had been of the character we have supposed—an isolated transaction of assumed agency for sale of confederate bonds—the judgment of the court must have been for the defendant.

But such was not the character of the transactions. Before they were had or contemplated, a valid contract of agency was created between the parties, large enough in its scope to include transactions in negotiable paper and securities. The Union bank, on receiving these confederate bonds, might have insisted that, though a sale of them might be within the scope of the agency, still it had a right to refuse to sell them because a sale would be illegal. This it did not do. It treated the selling of the bonds as within the agency, sold them, and credited the proceeds, *and thus brought the proceeds of illegal transactions under the operation of a previously made and still subsisting and valid contract of agency.* And, the proceeds having thus been brought under the operation of the contract, the rights and obligations of the parties in respect to them were defined by that contract, and on that contract the plaintiff was entitled to and did sue for those proceeds.

The case is thus directly within the doctrine of the English pawnbroker cases before cited, and is closely analogous in principle to *Hardy* v. *Stonebraker*, 31 Wis. 640.

Any attempt to rest the case on the ground that the agreement for agency was illegal in its inception, but was legalized by the ille-

gal sale under it, so far at least as to entitle the Planters' Bank to the proceeds—while, confessedly, the Union Bank could not have recovered for advances or expenses in excess of those proceeds—would not only misrepresent the meaning of the court, but would set the case in hostility to principles almost axiomatic, and to all the decided cases, including *Ex parte Bulmer*, 13 Ves. 313, *which is cited in the opinion*, and *Armstrong* v. *Toler*, 11 Wheat. 258.

VIII.

Review of English Cases.

In *Sharp* v. *Taylor*, *Brooks* v. *Martin* and *Planters' Bank* v. *Union Bank*, several English cases are cited and relied on, some of which have been the subject of no little controversy.

In *Faikney* v. *Reynous*, 4 Burr. 2069, (1767) the plaintiff and one R. (who was also a defendant—see 3 Term Rep. 419, note,) had been equal partners for an illegal stock-jobbing adventure, forbidden by the statute 7 Geo. 2, *c.* 8, § 5. The transaction having resulted in a loss, plaintiff, *without any request from R.*, but voluntarily, paid the differences, and afterwards the defendants gave him the bond in suit, conditioned for repayment of one-half the sum so paid by him. The plaintiff was *held* entitled to recover.

In *Petrie* v. *Hannay*, 3 Term Rep. 418, (1789,) A, B, and C were equal partners for an illegal stock-jobbing adventure prohibited by statute 7 Geo. 2, *c.* 8, § 5. The transactions resulted in losses, and the differences were all paid by one Portis, their broker. A repaid Portis the entire amount paid by him, except one-third, for which B accepted a bill drawn by A in favor of Portis. The bill was not paid at maturity, and, A having died, Portis sued the executors of A as drawer, and recovered, illegality not being pleaded. A's executors paid the judgment, and brought this action against B, the declaration being for money paid by plaintiffs to defendant's use. They were held entitled to recover.

In *Tenant* v. *Elliott*, 1 Bos. & Pul. 3, (1797,) the defendant, a broker, effected for plaintiff an insurance, which was alleged to be illegal. The vessel having been lost, the underwriters paid the

money to defendant, who refused to pay it over to the plaintiff. The plaintiff recovered.

In *Ex parte Bulmer*, 13 Ves. 313, (1807,) before Lord Erskine, Bulmer placed in the hands of one Pratt, a stock-broker, large sums of money to be used in illegal stock transactions. Pratt kept an account with Bulmer, crediting him with the profits and charging him with the losses as they occurred. But while he had in his hands a large sum of Bulmer's money to be so applied, he diverted it wholly to his own use, without employing it at all in those transactions. He became insolvent, and gave Bulmer his notes for the balance due him, which was in part composed of profits on illegal transactions. Bulmer attempted to prove these notes under the commission of bankruptcy against Pratt's estate. The chancellor said: "I shall not permit Bulmer to prove the promissory notes as binding obligations, as the consideration for them is made up, though a very small part, of the fruit of the illegal use of the money lodged with the bankrupt; but I shall allow him to prove all that is admitted by the bankrupt to have been the money put into his hands and diverted to his own use."

As to *Faikney* v. *Reynous*, *Petrie* v. *Hannay*, and *Tenant* v. *Elliott*, it is to be observed that they all proceed on the theory that the illegality in the transactions consisted wholly in making the stock-jobbing contracts and the contract of insurance. The court assumes that it would not have been illegal for the parties to the suit to pay the differences on the stock-jobbing transactions, or for the underwriters to pay the insurance.

In *Cannan* v. *Bryce*, 3 B & A. 179, 185, (1819,) cited with approval in *Hanauer* v. *Doane*, 12 Wall. 342, 347, the stock-jobbing act was construed as making the payment of differences in itself an illegal act. Had such been the construction of the acts of parliament in the cases we are reviewing, then it is clear that such illegal act, with or without a request, could not be a legal consideration for an express or implied promise of repayment.

Faikney v. *Reynous* and *Petrie* v. *Hannay* also proceed on the theory that although the payments were in themselves lawful, yet, if plaintiff's claim were on an express or implied promise contained

in or founded on the original agreement for the joint adventure, and not on a new agreement on a new consideration after the stock-jobbing transactions, so far as illegal, had been closed, the plaintiff could not have recovered. On this point see *Booth* v. *Hodgson*, 6 Term Rep. 405, (1795,) "in which judgment," says Lord Erskine, in *Ex parte Bulmer*, "I entirely concur." And see, also, *Root* v. *Stevenson*, 24 Ind 115; *Lemon* v. *Grosskopf*, 22 Wis. 427.

In the two cases we are considering the decision is placed on the ground of a valid promise, on a new consideration, to repay one who has paid money which another, though under no obligation so to do, might lawfully pay. In *Petrie* v. *Hannay*, although (as observed by Lord Kenyon and in accordance with what is now the law) Portis, having paid the differences voluntarily and without request, could not have recovered from A's executors, or B, yet the acceptance of the bill by B was a request to A to pay Portis; and his executors, having made the payment, (there being no countermand of the request,) could recover, and the case is placed on this ground.

In *Tenant* v. *Elliott*, it is quite clear that the payment to the broker was not in pursuance of anything in the agreement employing him or in the insurance agreement. Had such been the case, plaintiff could not have recovered. Moreover, an employment of a broker to effect insurance does not by implication empower him to receive the insurance-money in case of loss. The broker's only defence seems to have rested on the theory that he was liable to refund the money to the underwriters.

These cases and the distinctions which they involve are illustrated in *Brown* v. *Tarkington*, 3 Wall. 377. If the note in that case had been made for money lent or expended on request of the bank after it had closed its business, and for use in the meritorious purpose of redeeming its bills, it would seem to have been free from any illegality. And in *Lemon* v. *Grosskopf*, 22 Wis. 427, if the original employment had provided that one agent for the sale of lottery tickets should pay over to the other, for the principal's use, the proceeds of sales, the principal could not have recovered them from the latter any more than he could the proceeds of tickets sold by the latter.

Petrie v. *Hannay* and *Tenant* v. *Elliott* are therefore in full accordance with a position we have all along maintained.

The same would be true of *Faikney* v. *Reynous*, if, after the losses had been incurred, R. had requested Faikney to pay them. But the decision (regarding, as it does, the case as if standing, not on a bond, but on a parol express promise) is open to criticism, not on any question of illegality, but because, Faikney's payment being wholly voluntary and without request, the law would not—as the court concedes—imply a promise of repayment. The court, however, in accordance with Lord Mansfield's view of moral obligation, (see *Pillans* v. *Van Mierop*, 3 Burr. 1633,) holds that such a voluntary payment for another, though it would not raise an implied *assumpsit*, would support a subsequent express promise. This doctrine at one time had considerable currency,—see *Lee* v. *Muggeridge*, 6 Taunt. 36, (1813)—and probably induced Chief Justice Marshall's observations on this case in *Armstrong* v. *Toler*, 11 Wheat. 258, 273: "A subsequent express promise is, undoubtedly, equivalent to a previous request." But this doctrine has been long since abandoned as unsound. *Eastwood* v. *Kenyon*, 11 Ad. & El. 438; Met. on Cont. 184; Pollock, Cont., 157-9; 1 Pars. Cont. *432. We are not aware that the precise question has ever been raised or expressly decided in this court: but we have no doubt that regarding *Faikney* v. *Reynous*, as a case on a simple contract, and irrespective of any question of illegality, this court would now hold the *ratio decidendi* of that case not to be law.

As to *Ex parte Bulmer*, it will be observed that so far as it allowed a recovery, it proceeded in *disaffirmance* of the illegal agreement for agency. Bulmer was not allowed to recover for any money actually used in stock-jobbing, *nor for any profits in Pratt's hands*. This part of the decision holds just the reverse of the doctrine imputed to *Planters' Bank* v. *Union Bank*, and shows that the court in that case, citing *Ex parte Bulmer* as authority, did not intend to assert a doctrine in direct opposition to it.

That part of the decision which proceeds on the ground of disaffirmance, while not material here, may be tested by the cases on

that subject already cited and by *Sampson* v. *Shaw*, 101 Mass. 145, and *Perkins* v. *Savage*, 15 Wend. 412; *Raymond* v. *Leavitt*, 46 Mich. 447. And see *Herman* v. *Jeuchner*, 15 Q. B. Div. (C. A.) 561.

In *Farmer* v. *Russell*, 1 Bos. & Pul. 296, (1798,) the case was this: Plaintiff sold to a person at Portsmouth counterfeit halfpence, to be distributed among the sailors there. The defendants were common carriers, and plaintiff delivered to them the halfpence, packed in boxes and described as "medals," to be carried to Portsmouth and there delivered to the buyer upon payment by him to the defendants of the price. That is, the defendants' contract with plaintiff was to carry the goods to Portsmouth, collect the price on delivery, and pay over to plaintiff the money collected, less their charges. All this they did, except that they failed to pay over £13 of the money collected, and for this the plaintiff brought this action of assumpsit. No knowledge of the character of the goods was imputed to defendants, unless their clerk saw what the goods were upon the accidental opening of one of the boxes; but whether he did see, and, if so, whether before or after delivery to the buyer, was left at least doubtful by the evidence, (p. 300.) Eyre, C. J. and Buller and Heath, JJ., *held* plaintiff entitled to recover, putting the case on the ground that the suit was not on the illegal contract of sale, but on the fact that defendants received the money for plaintiff's use, and the implied contract thereupon arising, and holding the case not distinguishable from *Tenant* v. *Elliott*. But Eyre, C. J., held that if the defendants knew what they were carrying, or if it was possible "to mix the original transaction with the contract on which the action is brought," the suit would not lie. (p. 302.) Rooke, J., (who tried the case,) dissented, thinking it "monstrous" that the defendants, if innocent, should be liable, but, if guilty, not liable, to the certainly guilty plaintiff.

To make this case an authority in point for plaintiff, it should appear that one of two partners in the uttering of counterfeit money, had sued the other for a division of the proceeds received by him upon sales, and the court had sustained the suit. But such a precedent is yet to be produced.

This case seems to invite the criticism that the receipt of the

money by defendants (however innocent they may have been) was upon a consideration in itself illegal, and in furtherance of the illegal agreement between plaintiff and the buyer, for sale and delivery of the halfpence. The consideration of the payment of the money to the defendants was the concurrent delivery of counterfeit halfpence to the buyer, in furtherance of an illegal agreement for sale. This delivery was an unlawful act, and could not form the consideration of a promise express or implied. *Nicholson* v. *Gooch*, 5 El. & Bl. 999, 1017-8, *per* Crompton, J. True, the carrier is assumed to have been an innocent party. But though an agreement on an illegal consideration may sometimes perhaps be treated as valid in favor of the less guilty party, as in case of oppression, or in favor of a party who has entered into it in ignorance of *a fact* making it illegal, (*Roys* v. *Johnson*, 7 Met. 162,) or on false representations (of fact) showing it to be legal, and who therefore may not be *in delicto* at all, (*Sykes* v. *Beadon*, 11 Ch. Div. 170, 193, 197,) it is believed to be well settled that the guilty party cannot found rights on the agreement as against such innocent or less guilty party, any more than against one *in pari delicto*. Nor is any reason apparent why he should. In favor of an innocent or oppressed party to an illegal agreement, the policy of the law may relax the rule that an act prohibited by law cannot be a legal consideration for a promise, but why should that rule be relaxed in favor of a guilty party? Here the buyer and seller having made the illegal contract of sale, the plaintiff, in furtherance and execution of that agreement, procures to be done by defendants the illegal act of delivering the halfpence, in which act the buyer actively participates. It is not easy to see how either buyer or seller could assert any rights under any express or implied contract based on such a transaction, or why such a case should be an exception to the rule that "no suit can be maintained upon an unlawful act" by the guilty party. *Cannan* v. *Bryce*, 3 B. & A. 179.

Herein the case differs from *Tenant* v. *Elliott*, and from what it would have been if the defendants had not been originally employed to receive the money, and it had been paid to them, not in consideration of delivery of the halfpence, but merely on the new consideration, not connected with the illegal sale or delivery, of their re-

ceiving it and paying it over to plaintiff. And it is distinguishable from the English pawnbroker cases, for here there was (so far as the plaintiff was concerned) no originally legal contract of agency, under the operation of which the proceeds of illegal transactions might be brought. Plaintiff's employment of defendants was an illegal act on his part, and was an illegal consideration for any express or implied contract of agency. The employment was for an illegal purpose, and no lawful contract of agency was created.

On these grounds we conceive that *Farmer* v. *Russell* is open to criticism. But since it was decided on the theory of a new contract on a new consideration, it does not, whether right or wrong in its application of the theory, go to show that a recovery can be had on an illegal agreement.

The case of *McBlair* v *Gibbes*, 17 How. 232, is also cited in *Planters' Bank* v *Union Bank*. But in that case, in 1829, long after Mexico had established her independence, one Goodwin, in consideration of the release of a subsisting debt, assigned to one Oliver his claim to reimbursement from Gen Mina, or from the Mexican government, of money furnished under an illegal agreement, made in 1816, in aid of military operations against Spain, by Mexico in her struggle for independence. This assignment was certainly on a new and valid consideration (the release of a lawful debt,) and was in furtherance of no unlawful purpose, for it was not unlawful (though not obligatory) for Gen. Mina or for Mexico to repay the money thus advanced. It was like the case of the assignment (held good in equity) of any other mere expectancy, as that of an heir-at-law, or of the interest a person may take under the will of a person then living, as to which see 1 Lead. Cas. in Eq. (4th Am. Ed.) part 2, p 813; 2 Id. part 2, p. 1560.

That Mr. Justice Nelson, in *McBlair* v. *Gibbes*, did not consider that he was giving countenance to the doctrine against which we contend is apparent from his opinion in *Perkins* v. *Savage*, 15 Wend. 412. And see *Belding* v. *Pitkin*, 2 Caines, 147*a*.

Additional English cases, involving the same questions with those we have discussed, are

Mitchell v. *Cockburne*, 2 H. Bl. 379, (1794.)
Steers v. *Lashley*, 6 Term Rep. 61, (1794.)
Booth v. *Hodgson*, Id. 405, (1795.)
Brown v. *Turner*, 7 Term. Rep. 630, (1798.)
Aubert v. *Maze*, 2 Bos. & Pul. 371, (1801.)
De Begnis v. *Armistead*, 10 Bing. 107, (1833.)

All of these are in full accord with the rules for which we contend.

If *Brooks* v. *Martin* and *Planters' Bank* v. *Union Bank* were ever authority for the doctrine which plaintiff bases on them, that authority is certainly shaken by *Dent* v. *Ferguson*, 132 U. S. 50, where the court says that they are to be regarded as cases where plaintiff's title rested on "a new contract, on a new and independent consideration, although in relation to property respecting which there had been unlawful or fraudulent transactions between the parties," and intimates that, even when thus construed, they are of questionable soundness. Thus construed the cases give no aid to plaintiff, for here there is no pretence of any new agreement at all, whether on a new and independent consideration or not. The only agreement claimed is the original illegal agreement of 1876. And so we need not consider whether the facts of these cases as reported (and especially of the later one) fairly show any such new agreement, or whether, if the original agreement of agency was illegal, any agreement express or implied, having for its consideration the receipt of the money on delivery of the bonds, would not be illegal as upon an illegal consideration and in furtherance of the original illegal agreement of agency and the illegal sale of the bonds; and whether, since the contract of agency itself provided for receipt of the money by the agent to be paid to the principal, such receipt could give rise to an implied promise to do the same thing already provided for by the agreement of agency.

SUMMARY OF THE ARGUMENT.

We submit that the following conclusions are established:

I.

The agreement stated in the bill, if it was ever made, was, in its consideration and its purpose, illegal and against public policy, because in itself a breach of plaintiff's duty as receiver, as agent for the Dutch committee, and as manager for the trustees, and because directly tending to the commission of other breaches of trust and frauds by the plaintiff upon his *cestuis que trustent*, and upon the court, whose receiver he was.

II.

An agreement which is illegal because in violation of public policy is, as between the parties to it, utterly void, and is not a contract at all, and can give neither party to it any rights whatever as against the other. Nor can either party maintain against the other any suit whatever founded on such agreement.

III.

Any agreement is legal or illegal when made. If legal, its validity will not be impaired by any prior or subsequent illegal agreement between the parties to it, or any unlawful transactions under it.

If illegal, it will not become legalized by any subsequent act or omission of the parties, and clearly not by the commission and profitable completion of the illegal acts for which it provides or to which it tends.

IV.

Hence, although parties to an illegal agreement have, by unlawful transactions under it, acquired money or property, and although such transactions are closed, these circumstances cannot operate to

give to one party to such agreement any right to recover from the other, in any suit founded on such agreement, or by any title based on such agreement, any of the fruits of such agreement or such transactions.

V.

The cases of *Brooks* v. *Martin*, 2 Wall. 70, and *Planters' Bank* v. *Union Bank*, 16 Wall. 483, and the cases on which they rely for their support, are in accord with the foregoing propositions and conclusions, and do not constitute any exception thereto. Nor do these cases lend any countenance to the doctrine that an agreement illegal in its inception becomes so far legalized by the acquisition of property by means of unlawful transactions in the execution of it, that one party may maintain a suit, founded on such illegal agreement, to recover such property, or any part of it, from the other party thereto. For—

1. Parties who have made an illegal agreement and committed unlawful acts in execution of it, are not thereby deprived of rights under subsisting legal contracts, nor precluded from making valid contracts, with third persons or with each other, in respect to property acquired or losses incurred by such parties or either of them in such unlawful transactions.

2. The making of an illegal agreement, and its execution by means of unlawful transactions, do not preclude the property which the parties or either of them may have acquired from such unlawful transactions from becoming, immediately upon its acquisition, *ipso facto* subject to the provisions of a prior and subsisting lawful contract between the parties.

3. The cases in question are cases where the right to recover property realized from unlawful transactions, or to reimbursement for payment of losses incurred in such transactions, is founded, not on such unlawful transactions, or on any illegal agreement, but on a lawful contract, made prior or subsequent to such illegal agreement and transactions.

VI.

Plaintiff's case cannot be brought within any of the cases in which a recovery has been sustained. He shows no lawful contract at all, nor was he, as agent, manager, and receiver, capable of making a contract which should secure to him anything which he seeks to obtain in this suit. His case, on his own statement of it, rests solely on the illegal agreement alleged in his bill, and therefore has no foundation at all.

The ~~bill~~ decree should be ~~dismissed~~ affirmed.

M. D. GROVER,
GEO. B. YOUNG,
Counsel for Appellees.

150 US 572

In the Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1891. (No. 625.)

FILED
FEB 25 18
JAMES H. McKE
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JESSE P. FARLEY,
Appellant,

against

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, as Executor, &c., et al.,
Appellees.

Brief for James J. Hill and The St. Paul, Minneapolis & Manitoba Railway Company on Motion for Substitution.

M. D. GROVER,
GEO. B. YOUNG,
Solicitors and Counsel for Appellees.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891. (No. 625.)

JESSE P. FARLEY,
Appellant,

vs.

JAMES J. HILL, THE ST. PAUL TRUST COMPANY, (as Executor of the Last Will and Testament of Norman W. Kittson, Deceased,) and THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY,
Appellees.

Brief for James J. Hill and the St. Paul, Minneapolis & Manitoba Railway Company, defendants and appellees, in opposition to the petition and motion of the devisees and legatees of Norman W. Kittson to be substituted as defendants in place of the executor.

I.

1. Upon the death of Mr. Kittson, the plaintiff's cause of action against him surviving, the same survived against his representative, to-wit, his executor,

and did not survive against these petitioners, who are devisees and legatees, and who have not come into possession of the property devised or bequeathed to them. The plaintiff has no cause of action whatever against them. This is, in effect, conceded. Therefore, it is plain that they are not proper parties. For, to entitle them to be made such, it is not enough that the cause of action in the bill survives, but that cause of action must survive against the persons sought to be made parties. The petitioners, therefore, ask that the executor may be discharged—ousted—from the suit as a party, saying that, if the executor is ousted, it will proceed to distribute the estate according to the will; that the petitioners, upon such distribution being made, and upon receiving the property devised or bequeathed, will, as the recipients of such property, become proper parties to the suit.

Even if this last conclusion were sound, it would furnish no ground for making persons defendants who are not proper parties,—against whom there is no cause of action,—in order that, in conjunction with the executor, they may create a cause of action against themselves—may qualify themselves to be made defendants in the suit.

But the conclusion is not sound. Even if the estate had already been distributed, the petitioners would not be proper parties to *this* suit. This is a purely personal action. It is not brought to assert an equitable or other title to, or to enforce an equitable or other lien upon, any of the property, real or personal, specifically disposed of by the will. That property is not the subject-matter of the suit.

If, upon receiving the property, the petitioners

would incur any liability to plaintiff, it would not be a liability on the cause of action stated in the bill. *That* cause of action survived against the executor as *the representative* of Mr. Kittson. But the devisees and legatees are not *representatives* of the testator. They take the property they receive, not by *representation* but by *purchase*. (Story, Eq. Pl. § 379.) Plaintiff's only cause of action against them would be a cause of action against them, not as in any way the *representatives* of Mr. Kittson, but as purchasers, without consideration, of property to which plaintiff might resort to satisfy a claim, established by judgment or decree against Mr. Kittson or his executor, and after first exhausting his remedy against the property still remaining in the hands of Mr. Kittson's representative.

It is very evident that such a cause of action is not the cause of action alleged in the bill against Mr. Kittson, is not the cause of action alleged against either or all of the original defendants.

If petitioners are proper parties and may insist upon being made parties, then, upon the death of a defendant in an equity suit, based on a purely personal cause of action, every creditor of the decedent is a proper party to be made defendant, and may insist on being made a defendant—for the rights of creditors are certainly paramount to those of devisees or legatees. Certainly, every creditor whose claim has been allowed and paid (as stated in folio 10 of the petition) could insist on being made a defendant.

The petitioners concede, and on this motion it must be assumed, that the bill states a good cause of action against Mr. Kittson and his representative, the executor. It is equally clear that it states no

cause of action against the petitioners. And it would seem quite clear that a bill against these defendants, and also against the petitioners as purchasers, would be multifarious.

2. But the petitioners not only ask to be made parties. The motion is in terms and substance that they be "substituted" for the executor as defendants and appellees.

They ask that a *necessary* party be ousted from the case. For nothing is better settled than that where a cause of action like this—purely personal—survives, it survives to or against the *personal representative* of the decedent.

It is of course the right of these defendants to object to the omission or the discharge of a *necessary* party, and to object to such a joinder, in this suit, of a cause of action against these defendants with a cause of action against the petitioners as purchasers, as would make the suit multifarious.

Story, Eq. Pl. §§ 236, 271.

And there are special reasons why the executor should be retained as a party. This is a suit in which the court, if it hold that the contract on which the suit was based was made, *may* hold that, upon the pleadings and the evidence of what was done, each defendant is liable to the plaintiff not only for what he received himself, but also for what the other received. We do not say that the court ought to so hold any more than that it ought to hold, in opposition to the decision below, that the alleged or any agreement was made. But we do say that the court is as likely to hold that Mr. Hill is liable to plaintiff

for what Mr. Kittson received as it is to hold that either defendant is liable to plaintiff at all.

Should the court so hold, and these defendants or either of them be obliged to account and pay for what Mr. Kittson got, the defendant so paying would have a clear right of contribution from Mr. Kittson's estate. If the defendant Hill paid the full amount of the decree against both defendants, (as in the case supposed he might be compelled to do,) he would be clearly entitled to be subrogated to plaintiff's rights under the decree as a creditor of Mr. Kittson's estate, to the extent of his payment for that estate.

But if the executor is dismissed from the suit, there can be no decree against it, no decree against any representative of Mr. Kittson, no decree that would bind his estate.

This is conceded by petitioners, for they say that while this suit is pending against the executor, the latter cannot lawfully distribute the estate; and that if the executor is ousted, then there will be no suit pending, no claim existing against the estate, and therefore the Probate Court may lawfully distribute it.

In such case the most that could be done in this suit to protect the other defendants who may have had to repay what had been received by Mr. Kittson would be by provisions in the decree against these petitioners, one of them an infant, others married women, residing in various States of the Union, who are not as likely as the executor to preserve intact the amounts of their legacies, and against whom new suits in different jurisdictions would be necessary to enforce such provisions of the decree.

Such remedy would be far inferior to what these defendants will have if the executor continues a party defendant.

And as the bill seeks an accounting of the business of a partnership or *quasi* partnership, the defendant Hill certainly has the right to require the presence of Mr. Kittson's executor as a party.

In a suit for a partnership accounting, where one defendant disclaimed any interest, and thereafter died, the plaintiff, without bringing in his personal representatives, moved the cause for hearing. None of the surviving defendants had in their answers suggested any claim against the decedent. On the objection of the surviving defendants the court refused to hear the cause, although the plaintiff offered to waive all claims against the decedent or his estate, unless the defendants would consent to waive any right which, on the taking of the accounts, they might appear to have against the estate of the decedent. They refused to make the waiver, and the cause was ordered to stand over till the personal representatives should be brought in.

Glassington v. *Thwaites*, 2 Russell, 458.

And so in this case, *non constat* but that, on the accounting, it may appear that these defendants have claims against Mr. Kittson's estate, and the case cited holds that it is immaterial that no such claims are alleged in the answer.

And see *Bank* v. *Carrollton Railroad*, 11 Wall. 624, 630, 631.

II.

And even if the cause of action against Mr. Kittson survived against these petitioners, so that they would be proper parties, they cannot be made parties by this proceeding.

1. By the settled rules of English chancery practice, (in the absence of statutory modifications,) where a defendant dies (as in this case) *before decree*, even his personal representatives could not revive the suit by any proceeding.

"Where the abatement has occurred by the death of a defendant *before decree*, the suit can only be revived by the plaintiff or by those claiming under him; and it is to be observed that in no case before decree can a defendant or those claiming under him revive a suit."

3 Dan. Ch. Pr. (1st Ed.) 205.

2 Dan. Ch. Pr. (5th Ed.) 1539.

Story, Eq. Pl. § 372.

The remedy of the representative of a defendant dying *before decree* was to "apply to the court that the plaintiff may revive the suit against him, or that the bill may be dismissed."

3 Dan. Ch. Pr. (1st Ed.) 208.

2 Dan. Ch. Pr. (5th Ed.) 1539.

2. And under the chancery practice a suit was revived by a "bill of revivor" or a "bill in the nature of a bill of revivor."

"Whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law

gives or ascertains, as an heir-at-law, executor or administrator, * * * the suit may be continued by bill of revivor merely."

3 Dan. Ch. Pr. (1st Ed.) 200.

2 Dan. Ch. Pr. (5th Ed.) 1507.

Story, Eq. Pl. § 364.

"If, however, upon the abatement happening, the interest of the party does not vest in any representative which the law gives or ascertains, as in the case of bankruptcy or insolvency, or of a devisee of real estate, the suit cannot be continued by bill of revivor. * * * So also, in a suit relating to land, where a plaintiff dies, having devised the land which is the subject of the litigation, the suit must be continued by the devisee by another species of bill, called an original bill in the nature of a bill of revivor, and not by bill of revivor.

"The same rule applies to abatements occasioned by the death of parties defendant as well as of parties plaintiff. Therefore a bill of revivor will not lie against a devisee of a defendant, but the suit must be continued against him in the same manner that it is continued by the devisee of a plaintiff."

3 Dan. Ch. Pr. (1st Ed.) 200, 201.

2 Dan. Ch. Pr. (5th Ed.) 1508.

Story, Eq. Pl. §§ 377, 378.

Slack v. *Walcott*, 3 Mason, 508.

The ground of the distinction between the two classes of bills is stated in

Story, Eq. Pl. § 379.

3. Unless these rules have been changed by statute or by the equity rules established by this court, this proceeding cannot in any view of it be maintained, even if this were a case for revival against devisees, for

(1.) The suit can be revived against the petitioners only by plaintiff.

(2.) It can be revived against the petitioners only by an original bill in the nature of a bill of revivor.

4. No authority for this proceeding is found in any statute or in the equity rules.

The 31st section of the Judiciary Act of 1789, (1 St. at Large, 90,) now Rev. St. § 955, provides a summary mode of revival "when either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment," by enacting that "the *executor* or *administrator* of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly, and the court shall hear and determine the cause, and render judgment for or against the *executor* or *administrator*. And if such *executor* or *administrator*, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment as if the executor or administrator had voluntary made himself a party."

This court in *Clarke* v. *Mathewson*, 12 Pet. 164, treated this section as embracing suits in equity.

And the writ of *scire facias* was resorted to by plaintiff in an equity suit, and the practice was sustained, in

Allen v. *Fairbanks*, 40 Fed. Rep. 188.

But whether this section would permit the revival of a suit in equity otherwise than by the proper bill

is immaterial here, for it provides for revival only by or against *executors* or *administrators*.

Under this section no proceeding can be taken by or against an heir, or a devisee, or a legatee. "The power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee."

Macker v. *Thomas*, 7 Wheat. 530, 531.

5. There remains equity rule 56.

This rule provides:

"Whenever a suit in equity shall have become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time. And upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived as of course."

It will be noticed—

(1.) This rule does not state in what cases a bill of one kind and in what a bill of the other kind must be resorted to. This is left as before.

(2.) Nor does it say who are "the proper parties entitled to revive" the cause in any case. This too is left as before the rule.

(3.) Under the rule, therefore, (a) a suit can be revived against devisees only by original bill in the

nature of a bill of revivor, and (b) in case of a defendant dying *before decree*, his devisees cannot file the bill, but it must be filed by the plaintiff or his representatives.

Therefore this proceeding could not be maintained under this rule, even if the suit had not already been revived against the executor, and even if the petitioners would be proper parties, for (1) this proceeding is instituted by petitioners and not by plaintiff, and (2) it is not by bill in the nature of a bill of revivor.

6. The case is clearly not within rule 15 of this court, nor does the proceeding in any particular conform to that rule.

7. The petitioners show no sufficient reason why settled rules of procedure should be disregarded to enable them to come into a suit where they do not belong, and oust one who is an indispensable party. The reason alleged by them would apply in almost every case where a defendant in a suit (whether in a Federal or a State court) dies before judgment or decree. In the nature of things the pendency of such a suit must very often delay the distribution of the estate among legatees or devisees, and even among creditors. And in every such case, should this petition be granted, any of these classes would be entitled to oust the executor from the cause and to come in as defendants, even after it had been revived against him without objection from them, had thereupon proceeded to hearing and decree, and

an appeal to this court, and though nearly four years had elapsed since the testator's death, during all which time they had remained silent and acquiescent.

We submit that the application is wholly devoid of merit and should not be entertained.

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